ployer; N.L.R.B. v. Nash-Finch, 211 F. 2d 622, 627: Board cannot bestow upon union employees the benefits which it believes the union should have obtained but failed to obtain for them as a result of its collective bargaining with employer; N.L.R.B. v. McGahey, 233 F. 2d 406, 413: Board cannot "second guess" management or give it gentle guidance by over-the-shoulder supervision; N.L.R.B. v. Lewin-Mathes Co., 285 F. 2d 329, 333: Board should not use its functions to endeavor to compel concessions at the bargaining table.

[fol. 147] [16] Attached to defendant's brief is a copy of a decision of Special Adjustment Board No. 18, July 22, 1959, Thomas J. Mabry, Chairman and Neutral Member. The Order of Railway Conductors (on behalf of brakeman O. F. Lemon) and the Southern Pacific Company were parties to the dispute. In its opinion, the Board cited 7 decisions of the First Division, and 3 from other Divisions in support of its holding that the Board lacked authority, absent a provision in the contract, to pass upon the physical fitness of a railroad man disqualified by the Company physicians, or to set up a board of independent physicians for such purpose. The Special Adjustment Board No. 18 also cited Thomas v. New York, Chi. & St. L. R. R., 185 F. 2d 614, 617 and Hunter v. A. T. & S. F. Ry., 171 F. 2d 594, and stated that under the agreement as it was written at the time, the carrier's physicians must make the determination as to fitness for service.

This well reasoned decision demonstrates that the Board in the instant case was incorrect in its statement that "it had been consistently held" that it had jurisdiction to determine whether the employee had wrongfully been deprived of service, and also demonstrates a lack of uniformity of administrative construction as to jurisdiction to determine fitness and as to authority to set up an independent board of physicians for such purpose.

[fol. 148]

EXHIBIT A

"STATEMENT OF CLAIM: "Request for reinstatement of Engineer F. J. Gunther to service with all seniority rights inimpaired and pay for all time lost account of physical disqualified and taken out of service December 30, 1954.

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Claim of engineer for reinstatement in service and pay for time lost. Shortly after his 71st birthday claimant was disqualified from service by the chief surgeon on the basis of a physical examination by a company physician at Los Angeles. Upon his request he was then sent to the Southern Pacific General Hospital at San Francisco and there examined by carrier's medical superintendent following which the chief surgeon determined that he should not be returned to service.

Thereupon claimant went for examination to a recognized specialist at San Diego and on the basis of his report requested that a three doctor board be appointed to reexamine his physical qualification for return to service.

Upon denial of this request claim for reinstatement and back pay was filed in this Division resulting in Award 17 161 in which the claim was dismissed without prejudice on the ground that there was no showing whether or not claimant's physician and the company physicians disagreed as to claimant's physical qualifications. Now the claim has been progressed again with the inclusion of further statement by claimant's physician.

Carrier contends that notwithstanding such statement or any disagreement there is no rule permitting the appoint-

ment of a neutral medical board as here sought and that the decision of the chief surgeon that claimant is not physically qualified for service is not subject to review.

It is true that carrier has the right and responsibility of determining within proper limits the physical fitness of employee to remain in service. It is true also that the employe has the right to priority in service according to his seniority and pursuant to the agreement so long as he is physically qualified. Where these two rights come into collision it has consistently been held by this Division that [fol. 149] it has jurisdiction to determine whether the employe has wrongfully been deprived of service.

If carrier through its medical staff has removed an employe from service in good faith, on the basis of a fair standard of fitness, applied to his physical condition, adequately determined, there is no right to reinstatement. Otherwise he has been wrongfully removed from service.

Since determination of the facts necessary to enable the Division to make proper award on such issue requires expert medical competence, it has not been unusual, where adequate showing has been made of ground for challenge of carrier's decision, for the Division to provide for a neutral board of three qualified physicians, one chosen by carrier and one by the employe and the third by the two so selected, for the purpose of determining the facts as to a claimant's disability and the propriety of his removal from service. In such case the Division predicates its award upon the finding of the board of physicians.

While the statement of claimant's physician now submitted is generally equivocal we think that when considered in connection with his prior report and that of carrier's medical superintendent, it discloses sufficient substantial disagreement as to claimant's physical condition to justify further check up and inquiry by such a neutral board of physicians.

If the decision of the majority of such board shall support the decision of carrier's chief surgeon the claim will be

denied; if not, it will be sustained with pay pursuant to rule on the property from October 15, 1955, the date of the letter of Dr. Hall showing disagreement with the findings of disqualification by the company physicians.

AWARD: Claim disposed of per Findings.

Dated at Chicago, Illinois
this 2nd day of October, 1956."

[fol. 150]

EXHIBIT B

"INTERPRETATION

This docket presents claim previously before this Division with the present Referee sitting as a Member, which resulted in Award 17 646. As appears therein claimant had been held by carrier's chief surgeon to be no longer physically qualified to remain in service and the Division determined that there was sufficient disagreement as to claimant's physical condition to justify inquiry and finding by a board of three physicians, as not unusually required. It was declared that if the decision of the majority of such board should support the decision of carrier's chief surgeon the claim would be denied; if not, it would be sustained with pay pursuant to rule on the property, from October 15, 1955.

On June 30, 1958 claimant filed with the Division a supplemental submission setting out that following said award a board of three physicians had been agreed on and established as provided for therein, and that the findings and decision of the majority of said board did not support the decision of carrier's chief surgeon but found that claimant had no physical defect which would prevent him from carrying on his usual occupation, but that carrier advised claimant that "the findings of the three doctor board have been reviewed by the chief surgeon and interpreted to be such that you should not be returned to duty", and refused to reinstate claimant or pay him for time lost. Wherefore

claimant sought a new or supplemental award or an interpretation, to make absolute his right to reinstatement and pay for time lost.

Carrier now requests permission to file an answer to petitioner's submission and asserts that the Referee has authority to resolve any question of procedure in the matter before him. Claimant's submission was filed more than ninety days before the request without any request appearing for extension of time. In the meantime the Division deadlocked on the disposition of the dispute and it was submitted to the National Mediation Board which appointed a Referee; then the docket was given the Referee for study and thereafter on the day the matter came on for oral argument carrier made its request for permission to file answer. Even then no answer was tendered or time suggested when one might be prepared. In such situation, if the Referee has such authority as urged by carrier representatives permission would be denied.

We find from the record that the statements set out in claimant's submission are true; that a board of three physicians was selected by agreement of the parties for the purpose of determining claimant's physical qualification for [fol. 151] service; that the majority of said board properly examined claimant and that their findings and decision therefrom did not support the decision of carrier's chief surgeon but that they found and decided that claimant had no physical defects which would prevent him from carrying on his usual occupation as engineer.

The issue of fact upon which the prior Award 17 646 was conditioned having been determined in favor of claimant, said conditional award should be made absolute and final and the claim sustained as therein provided.

AWARD: Claim sustained for reinstatement with pay for all time lost from October 15, 1955 pursuant to rule on the property.

Dated at Chicago, Illinois
this 8th day of October, 1958."

[fol. 152] "ARTICLE 35.

SENIORITY.

"Section 1. Rights of engineers shall be governed by seniority in service of the Company as engineers and seniority of the engineer as herein defined shall date from first service as engineer.

"Sec. 2. Under consolidation of the San Diego & Arizona Railway and the San Diego and Southeastern Railway all engineers retain their seniority over lines on which they were employed prior to January 1st, 1918. Their system seniority will date from January 1st, 1918, date of consolidation.

"Sec. 3. (a) The Company will not assign any more engineers to each district or run than is necessary to move the traffic with promptness.

"(b) Where there is a surplus of engineers for the business of the district, the oldest engineer in point of seniority shall have the preference for employment."

* * * * *

ARTICLE 38.

REDUCTION OF FORCE.

"Section 1. (a) When, from any cause, it becomes necessary to reduce the number of engineers on the engineers' working list, those taken off, may, if they so elect, displace any fireman their junior on their seniority district.

Engineers Cut Off List.

"(b) When hired engineers are laid off account of reduction in service, they will retain all seniority rights; provided they return to actual service within thirty days from the date their services are required."

[fol. 153] "ARTICLE 47.

INVESTIGATIONS.

"Section 1. (a) No engineer shall be suspended or discharged, except in serious cases, where fault is apparent beyond reasonable doubt, until he has had a fair and impartial hearing before the proper officials. During such hearing he may be assisted by an engineer in service on his seniority district. When decision is rendered, if such engineer believes it unjust, he may take up his own case on appeal to the higher authorities and, if he so desires, may select an engineer in service on the same seniority district to assist him in presenting his case, but such representation shall be of a purely personal character, and shall not carry with it the sanction of committee representation. No adjustment made by the Company in such cases shall be construed or cited as precedent in any case presented by the Engineers' Committee.

"(b) If an engineer does not handle his own case, as above specified, the regularly constituted committee of the Brotherhood of Locomotive Engineers can appeal through the proper officials to the highest authority; hearing in all cases to be given and decision rendered promptly as possible.

"(c) In all cases where a formal investigation is held, the engineer under investigation will be entitled to representation by the Local Chairman of his organization or by any employe of the same grade in actual service on the engineer's seniority district.

"Interrogations will be made by the Superintendent or his representative who is holding the investigation. After he has completed the direct examination, officers of the Company who may be attending the investigation will be allowed to interrogate the witness.

"If the engineer's representative desires to ask any questions pertaining to the case of the man represented, he will be allowed that privilege.

"Where charges are made regarding engineers, same must be in writing.

"No demerits will be charged against an engineer's record without giving him an opportunity for defense and allowing him to present his side of the case.

"If the Chairman of the Local Committee requests a transcript of the testimony in an investigation that has been made, it will be furnished.

"NOTE: It is understood the above rules cannot be construed to have been properly observed unless the engineer and/or his representative are confronted with all the charges and evidence and provided with a copy of transcript of all evidence.

[fol. 154] "Section 1 (d) If an engineer is suspended or discharged and is proven to have been innocent of the offense charged, he shall be reinstated and paid $8.79 per day for time lost on such account."

[fol. 155]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 2459-SD-W

F. J. GUNTHER, Petitioner,

v.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY, a corporation, Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT—October 27, 1961

Defendant having filed a motion for summary judgment herein, and both parties having presented briefs and argument, and the Court having submitted the motion, and having considered the pleadings, the findings and awards of the National Railroad Adjustment Board, First Division,

[File endorsement omitted]

and the affidavits and exhibits on file with reference to such motion, and having filed its written opinion herein, now makes its findings of fact, conclusions of law and judgment:

Findings of Fact

1

Defendant at all times pertinent to this action was and now is a corporation organized and existing pursuant to the laws of the State of Nevada, and was and now is a carrier by railroad subject to the Interstate Commerce Act.

[fol. 156] 2

Petitioner was employed by defendant on December 18, 1916 as a fireman and was promoted to locomotive engineer on December 4, 1923, and was so employed by defendant until December 30, 1954.

3

On December 30, 1954, after examinations by defendant's physicians and a finding that plaintiff was physically disqualified from active service, plaintiff was, by defendant, removed and retired from the service of defendant.

4

On December 30, 1954 and at all times pertinent to this action, there was in effect a collective bargaining agreement between plaintiff and defendant's Union, Brotherhood of Locomotive Engineers. A copy of said agreement is on file, and is Exhibit "A" to the affidavit of K. K. Schump filed by the defendant on November 28, 1960.

5

Plaintiff requested that he be reinstated to active service, and upon denial of his request, filed a claim for reinstatement with the First Division of the National Railroad Adjustment Board.

6

On October 2, 1956, the First Division of the National Railroad Adjustment Board considered plaintiff's claim, found that it had jurisdiction to determine whether the plaintiff had wrongfully been deprived of service, and over defendant's protest that the Board lacked authority to review the decision of its chief surgeon, and that there was no rule permitting the appointment of a board of physi- [fol. 157] cians to determine the facts as to claimant's disability and the propriety of his removal from service, ruled that a board of physicians should be appointed, one member by the plaintiff, one member by the defendant, and a third by the two so selected. The Board further ruled that if the decision of the majority of such board of physicians should support the decision of the carrier's chief surgeon the claim of plaintiff would be denied; if not, the claim would be sustained with pay pursuant to the rule on the property from October 15, 1955.

7

A board of physicians was selected as provided by the Railroad Adjustment Board, and said physicians made their respective reports.

8

On October 8, 1958 the First Division of the National Railroad Adjustment Board ruled that the findings of the majority of said Board of physicians did not support the decision of carrier's chief surgeon, and made an award and order that defendant reinstate plaintiff with pay for all time lost from October 15, 1955.

9

The defendant refused to comply with the award and order of the National Railroad Adjustment Board, and on September 26, 1960, plaintiff filed this action to enforce said order of said Board.

10

At all times pertinent to this action said collective bargaining agreement hereinbefore referred to contained no provision limiting the right of defendant to remove and retire plaintiff from active service upon a finding by defendant's physicians that plaintiff was physically disqualified from active service.

[fol. 158]

11

At all times pertinent to this action said collective bargaining agreement hereinbefore referred to contained no provision for a board of physicians to review the findings of defendant's physicians as to physical disqualification of its employees.

Conclusions of Law

The Court Concludes:

1.

The Court has jurisdiction of the subject matter of this action and of the parties hereto.

2.

At all times pertinent to this action the defendant had the right to remove and retire plaintiff from active service upon a finding by its physicians that plaintiff was physically disqualified from such service.

3.

At all times pertinent to this action there was not in effect any agreement between defendant and plaintiff's union limiting the right of plaintiff mentioned in Paragraph 2.

4.

The action of plaintiff in removing and retiring plaintiff from active service upon a finding by its physicians that

plaintiff was physically disqualified from such service violated no provision of any agreement in effect between defendant and plaintiff's union.

5.

The award of the First Division, National Adjustment Board, dated October 8, 1958, here sought to be enforced [fol. 159] is erroneous and should be set aside.

6.

The pleadings, admissions and affidavits on file show there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

Judgment

It Is Ordered:

The motion for summary judgment of defendant is granted.

The award of the First Division, National Adjustment Board dated October 8, 1958 is set aside.

Defendant shall have its costs.

Dated this 27th day of October, 1961.

Jacob Weinberger, United States District Judge.

Copies to:

Gostin & Katz, Attorneys for Petitioner, 725 U. S. Grant Hotel, San Diego 1, California;

Gray, Cary, Ames & Frye, James W. Archer, Eugene L. Freeland, Attorneys for Defendant, 1410 Bank of America Building, San Diego 1, California.

[fol. 168]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 2459 SD-W

[Title omitted]

NOTICE OF APPEAL—Filed November 27, 1961

Notice is hereby given that F. J. Gunther, petitioner above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 27, 1961.

Dated: November 22, 1961.

Hildebrand, Bills & McLeod, Charles W. Decker, By Charles W. Decker, Attorneys for Petitioner.

[fol. 169] Proof of Service by Mail (omitted in printing).

[fol. 174]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 2459 SD-W

[Title omitted]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL—Filed February 1, 1962

To Appellee, San Diego & Arizona Eastern Railway Company, and to Its Attorneys:

Pursuant to Rule 75 (d), Federal Rules of Civil Procedure, Petitioner and Appellant hereby designates the following as the points upon which he intends to rely on appeal.

[File endorsement omitted]

(a) That the District Court erred in concluding that the pleadings, admissions and affidavits on file show there is no genuine issue as to any material fact and the defendant is entitled to judgment as a matter of law. (Conclusion of Law #6)

(b) That the District Court erred in concluding as a matter of law that the applicable collective bargaining agreement was without ambiguity on the question of the right of defendant to remove and retire plaintiff from active service upon a finding by its physicians that plaintiff was physically disqualified from such service and that, therefore, plaintiff was precluded from resorting to evidence extrinsic to said collective bargaining agreement for [fol. 175] the purpose of clarifying such ambiguity and establishing his right to remain in active service and employment so long as he was, in fact, physically qualified to perform the services required of a locomotive engineer by defendant. (Opinion of the District Court dated September 27, 1961, page 20)

(c) That the District Court erred in concluding as a matter of law that the National Railroad Adjustment Board, First Division, exceeded its jurisdiction in holding that it had jurisdiction to determine whether an employee has wrongfully been deprived of service and in establishing an impartial board of examining physicians to determine plaintiff's physical fitness to continue in active service as a means of exercising that jurisdiction. (Opinion of the District Court dated September 27, 1961, pages 28-29).

(d) That the District Court erred in finding that the applicable collective bargaining agreement contained no provision limiting the right of defendant to remove and retire plaintiff from active service upon a finding by defendant's physicians that the plaintiff was physically disqualified from active service. (Findings of Fact #10)

(e) That the District Court erred in concluding that at all times pertinent to this action the defendant had the right to remove and retire plaintiff from active service upon

a finding by its physicians that plaintiff was physically disqualified from such service. (Conclusion of Law #2)

(f) That the District Court erred in concluding that at all times pertinent to this action there was not in effect any agreement between defendant and plaintiff's union limiting the right of defendant to remove and retire plaintiff from active service upon a finding by defendant's physicians that plaintiff was physically disqualified from such service. (Conclusion of Law #3)

[fol. 176] (g) That the District Court erred in concluding that the action of defendant in removing and retiring plaintiff from active service upon a finding by its physicians that plaintiff was physically disqualified from such service violated no provision of any agreement in effect between defendant and plaintiff's union. (Conclusion of Law #4)

(h) That the District Court erred in concluding that the award of the First Division, National Adjustment Board, dated October 8, 1958, sought to be enforced in this action is erroneous and should be set aside. (Conclusion of Law #5)

Dated: San Francisco, California, January 30, 1962.

Hildebrand, Bills & McLeod, Charles W. Decker, By Charles W. Decker, Attorneys for Petitioner and Appellant, F. J. Gunther.

[fol. 177] Proof of Service by Mail (omitted in printing).

* * * * * * *

[fol. 182]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil Docket

JURY

Jury demand date: 4-24-61

2459-SD-W

F. J. GUNTHER, Petitioner,

—vs.—

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY, a corporation, Respondent.

For plaintiff:

Hildebrand, Bills & McLeod, 1212 Broadway, Oakland 12, Calif., GL 1-6732.

[fol. 182½]
2459-SD-W

DOCKET ENTRIES

DATE	PROCEEDINGS
9/26/60	Fld petn to enforce award & ord of Nat'l RR adjustment Board. Sums mailed to atty in San Francisco. Md JS-5.
11/15/60	Fld sums svd as to each deft.
11/28/60	Fld not of mot & mot for summy judgt noticed for 12/14/60 2 PM. Fld memo of pts & auths. Fld affid K. K. Schomp. Lodged judgt.
12/ 2/60	Fld ord for con't from 12/14/60 to 12/19/60, 10 am for hrg mot for summy Judgm (W). Fld supplemental affid of K.K. Schomp.
12/12/60	Fld petnr's memo in oppos to mot for summy judgmt.

DATE	PROCEEDINGS
12/19/60	At req of counsel, ord submitted w/o argument (W).
3/27/61	Ent ord deft mot for summary jdgmt as to grounds labelled 1 & 11 is denied. Copies sent to counsel. (Fld courts memo opinion (W)
4/10/61	Fld ord allowing deft up to & including 4/24/61 in which to ans or move fur in response to petn on file (W)
4/24/61	Fld ans of deft. Fld demand for Jury Trial.
5/ 9/61	Fld assoc of attys & ord thereon (W).
5/16/61	Fld not of mot & mot for summy jdgmt, notce for 5/29/61, 2 P.M. Fld affid of K. K. Schomp. Fld memo of pts & auths. Fld proposed findgs of fact and conc of law. LODGED proposed jdgmt.
5/29/61	Fld petners memo in oppos to mot for smmy jdgmt. Fld petnrs affid in oppos to mot for summy jdgmt. Hrg mot for summy jdgmt & settg for P/T & settg for Trial. Both sides argue Ord cont to 7/3/61, 10 A.M. for fur procs or submssn (W).
6/26/61	Ent ord fur proceedngs or submission in the above-entitled matter is cont to 7/21/61, 10 A.M. (W). Copies to counsel.
7/21/61	Ord matter submitted (W)
9/28/61	Filed opinion (W). Ent min ord that within 10 days deft will srv findgs, con of law and jdgmt in conformity with opinion; petnr may have 5 days after srv file objects as to form only (W)
10/27/61	Fld order granting defts motion for summary judgment, that award of First Division, National Adjustment Board dated 10-8-58 is set aside,

DATE	PROCEEDINGS
	and awarding defts costs. (W) (Ent 10-27-61 and not attys) JS-6
10/30/61	LODGED proposed findings of fact, conclusions of law & jdgmt.
11/ 6/61	Fld. not of ent of jdgmt
11/27/61	LODGED & Fld Not of Appeal LODGED & Fld stip & waiver re bond for costs on appeal & ord thereon (W)
1/ 4/62	Fld ord extending time for flg record or appeal to 2/25/62 & Docketing Appeal (W)
2/ 1/62	Fld designation of portions of the record to be contained in record on appeal Fld statements of pts on which appellant intends to rely on appeal.
2/ 8/62	Fld appellee's designtn of portns of recrd to be contained in the record on appeal

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[fol. 184]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 2459 SD-W

[Title omitted]

NOTICE OF MOTION FOR RELIEF FROM FINAL JUDGMENT (RULE 60(b), FEDERAL RULES OF CIVIL PROCEDURE)—Filed June 5, 1962

To Defendant San Diego & Arizona Eastern Railway Company and Its Attorneys:

Please Take Notice that on June 25, 1962, at 2:00 P. M. of said day, Petitioner F. J. Gunther, at the courtroom

[File endorsement omitted]

of the above entitled court located in the United States Custom House and Court House Building, San Diego 1, California, will move the Court to set aside its judgment heretofore entered on October 27, 1961 upon the following grounds:

1. Mistake, inadvertence, surprise or excusable neglect;

2. Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial; and

3. For other reasons justifying relief from the operation of said judgment.

Said motion will be made pursuant to the authority of Rule 60(b) of the Federal Rules of Civil Procedure and [fol. 185] will be based upon this notice, the points and authorities set forth below, the affidavits of J. P. Colyar, F. J. Gunther and Charles W. Decker, filed and served herewith, and evidence, both oral and documentary, to be adduced at the hearing of said motion.

Dated: June 4, 1962.

Hildebrand, Bills & McLeod, Clifton Hildebrand, Charles W. Decker, By Charles W. Decker, Attorneys for Petitioner.

Points and Authorities

1. Rule 60 (b), Federal Rules of Civil Procedure confers upon the court discretion to relieve a party or his legal representative from a final judgment upon the ground of mistake, inadvertence, surprise or excusable neglect, or newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial, or for any other reason justifying relief from the operation of the judgment.

2. This court has jurisdiction to entertain a motion for relief from final judgment despite the pendency of the appeal therefrom.

Binks v. *Ransburg Electro-Coating Corp.*, 7 Cir. 1960, 281 F. 2d 252, 260-261, cert. granted 81 S. Ct. 353, 364 U.S. 926, cert. dismissed 81 S. Ct. 1091, 366 U.S. 211

3. Any doubt as to whether in the court's discretion a motion to open a judgment should be granted is resolved in the movant's favor.

U. S. v. Small, D.C.N.Y. 1959, 24 F.R.D. 429

[fol. 186] Proof of Service by Mail (omitted in printing).

[fol. 187]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 2459 SD W

[Title omitted]

AFFIDAVIT OF J. P. COLYAR—Filed June 5, 1962

State of California,
City and County of San Francisco, ss.

J. P. Colyar, being duly sworn, deposes and says:

I make this affidavit in support of the motion of petitioner, F. J. Gunther, to be relieved from the operation of the judgment of this Court heretofore made and entered on October 27, 1961.

If called as a witness, I would be competent to testify as follows:

I am the Chairman, General Committee of Adjustment, Brotherhood of Locomotive Engineers, for the Southern Pacific Company (Pacific Lines), the former El Paso & Southwestern System, the Northwestern Pacific Railroad

[File endorsement omitted]

Company, the San Diego & Arizona Eastern Railway Company, the Oregon, California and Eastern Railway Company, and the Southern Pacific Railway Company of Mexico. I have been employed in said capacity by the Brotherhood of Locomotive Engineers since August 22, 1947.

In said capacity it has been and now is my responsibility to negotiate with all of said railroad carriers with respect [fol. 188] to terms and conditions of employment of locomotive engineers in the employ of said carriers and to adjust claims and grievances arising under existing collective bargaining agreements between said carriers and the Brotherhood of Locomotive Engineers.

At all times since a date prior to March 1, 1935, the Brotherhood of Locomotive Engineers has been the railway labor organization designated by the National Railroad Mediation Board to represent locomotive engineers employed by the Southern Pacific Company and, also, by its wholly owned subsidiary, the San Diego & Arizona Eastern Railway Company, for purposes of collective bargaining and settlement of disputes arising under collective bargaining agreements with said carriers. At all of said times there has been in existence a collective bargaining agreement between the Southern Pacific Company and the Brotherhood of Locomotive Engineers representing the locomotive engineer employees of that company (hereinafter referred to as the SP-BofLE agreement), and a collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and the Brotherhood of Locomotive Engineers representing locomotive engineer employees of that company (hereinafter referred to as the SD&AE-BofLE agreement). I am thoroughly familiar with all of the contractual provisions contained in both such agreements and the interpretation and application thereof in the day-to-day relationships between said companies and their locomotive engineer employees.

Said agreements have been evidenced by printed booklets containing the terms thereof as of the date of printing, together with written memoranda principally in the form of correspondence between the parties thereto evidencing changes in and additions to the terms of said agreements

effected subsequent to such printing. It is not customary in the railroad industry to print a new booklet each time the contracting parties agree to some modification to the existing agreement whether such modification is in the form of elimination of an existing provision, change in an ex- [fol. 189] isting provision, or addition of a new provision. Instead, such modifications are evidenced by exchanges of correspondence between the contracting parties and other such written memoranda.

The SD&AE-BofLE agreement of March 1, 1935, as revised on November 30, 1938, was reduced to printed booklet form. The green-covered booklet submitted to this court as Exhibit "A" to the affidavit of K.K. Schomp filed herein on November 28, 1960 is one of such booklets. Said booklet, as printed, contained all of the terms of the SD&AE-BofLE agreement as of November 30, 1938. However, following November 30, 1938 and prior to the printing of a new booklet containing the terms of said agreement as of January 1, 1956, there were many modifications, including additions, thereto. One such addition, the provision for adjustment of disputes between the carrier and employee as to the employee's physical fitness for performance of his duties as locomotive engineer by the establishing of a three-physician panel to make said determination, resulted from the following.

As of November 30, 1938 the SP-BofLE agreement and the SD&AE-BofLE agreement contained identical provisions relating to the right of engineers assigned to regular runs to be paid for time lost through no fault of their own. The provision was Article 12, Section 1 of the SP-BofLE agreement and Article 9, Section 1 of the SD&AE-BofLE agreement. It read as follows:

> "When, from any cause, more engineers are assigned to a certain run than can (per actual mileage of said run) make full time at the standard pay for service and division on which such runs occur, mileage in excess of actual miles run will be allowed sufficient to give such engineers full time. Full time as herein referred to shall be understood to mean 100 miles at the

standard rate for the district and service for each engineer assigned to the run for each day per week that the train, or trains are scheduled to run, but in no case under the provisions of this Article shall an engineer receive less than full pay for six days per week, provided engineer is available for service on assigned or other runs. This Article shall in no way apply to runs, the daily number of trains composing which are uncertain."

As a result of an interpretation placed upon Article 12, [fol. 190] Section 1 of the SP-BofLE agreement by the National Railroad Adjustment Board, First Division, in Awards 4296, 4297, 4298 and 4299, the parties to the SP-BofLE agreement added Article 12, Section 1(c) to their agreement. It read as follows:

"Engineers assigned to regular runs, who through no fault of their own are not used thereon and their runs are worked in whole or in part, will be allowed the full mileage of their assignments."

Thereafter, by an exchange of letters between the parties to the SD&AE-BofLE agreement, culminating with a letter dated January 4, 1945 from H. R. Gernreich, Vice President and General Manager, San Diego & Arizona Eastern Railway Company, to P. O. Peterson, General Chairman, Brotherhood of Locomotive Engineers, it was agreed between the parties to the SD&AE-BofLE agreement that interpretations placed upon provisions of the SP-BofLE agreement would be applicable to similarly worded provisions of the SD&AE-BofLE agreement. In addition, by said exchange of correspondence, a new provision, Article 9, Section 1(c), was added to the SD&AE-BofLE agreement identical to the above-quoted Article 12, Section 1(c) of the SP-BofLE Agreement.

Attached hereto, marked Exhibits A, B, C, D, E, F, G, H, I and J, are true copies of the items of correspondence which affected said modifications of the SD&AE-BofLE agreement, which said exhibits are here referred to and,

by such reference, incorporated herein as though here set forth in full.

Thereafter, on November 13, 1947, as a result of a dispute arising under Article 12, Section 1(c) of the SP-BofLE agreement quoted above, the parties to that agreement placed an interpretation upon said Article 12, Section 1(c) covering disputes arising out of time lost from regularly assigned runs by engineers because of the necessity for taking periodic physical examinations and because of removal from active service by the company upon the [fol. 191] ground of physical disqualification. Said interpretation specifically provides for resolution of disputes between company and its regularly assigned engineers as to physical fitness for duty through use of a three-physician panel. It is evidenced by letters of October 2, 1947 and November 13, 1947 of H. R. Hughes, Assistant General Manager, and C. M. Buckley, Assistant Manager of Personnel, Southern Pacific Company, the first addressed to H. C. Hobart, Assistant Grand Chief Engineer and to affiant, General Chairman, Brotherhood of Locomotive Engineers, and the second addressed to W. G. Burbank, Asst. Grand Chief Engineer, Brotherhood of Locomotive Engineers. Attached hereto, marked Exhibits K and L, are true copies of said letters, which said exhibits are here referred to and by such reference incorporated herein as though here set forth in full.

By reason of the foregoing, since November 13, 1947 and to and including December 30, 1954, the date Mr. F. J. Gunther was removed from service by the San Diego & Arizona Eastern Railway Company, the SD&AE-BofLE agreement contained a provision whereby, in the event a SD&AE engineer was removed from service on account of his physical condition by the company and the engineer desired the question of his physical ability to conform to prescribed physical standards to be further investigated and determined, a special panel of physicians consisting of one doctor selected by the company, one doctor selected by the employee, and a third doctor selected by the two so appointed, was to examine the employee and the report of

such panel accepted as determinative of the employee's physical fitness to continue in service.

Said provision relating to a three-physician panel to resolve disputes as to the physical fitness of engineer employees remained in the form shown on Exhibits K and L hereto until December 1, 1959 when it was changed as a [fol. 192] result of the following.

On August 28, 1959 affiant requested that the language of said provision be modified. Said request, marked Exhibit M, is attached hereto and, by reference, incorporated herein as though here set forth in full. Affiant's purpose in making said request was not to add a new provision to the existing agreements referred to in said request, it was to clarify and make more explicit the existing provision as set forth in exhibits K and L hereto, and affiant so advised the representatives of defendant and the Southern Pacific Company who entertained, and subsequently acceded to, said request. Said request was granted by letter, with enclosures, of L. M. Fox, Jr. of the personnel department, Southern Pacific Company, dated November 4, 1959 and addressed to affiant. True copies of said letter and enclosure, marked Exhibits N and O, are attached hereto and, by reference, incorporated herein as though here set forth in full.

J. P. Colyar

Subscribed and sworn to before me this 1st day of June, 1962.

Alice L. O'Connor, Notary Public, In and for the City and County of San Francisco, State of California. My Commission Expires April 17, 1964.

[fol. 193]

EXHIBIT A TO AFFIDAVIT OF J. P. COLYAR

June 3, 1944

Mr. H. R. Gernreich
Vice President and General Manager
San Diego & Arizona Eastern Ry. Co.
277 Pacific Electric Building
Los Angeles 14, California

E-10386-68

Dear Sir:

Please be referred to Article 7, Engineers' Agreement, regarding work train and wrecking service. Said rule was taken from the Southern Pacific Engineers' Agreement, Articles 8 and 8½, and in order that the SD&AE Engineers' Agreement may conform with the Southern Pacific Engineers' Agreement, we are asking that the following portion of Section 3(b), Article 8, Southern Pacific Engineers' Agreement, be added to Section 3(b), Article 7:

> "Engineers deadheaded to an outside point to inaugurate service on an extra or unassigned work train, will be paid deadhead mileage under the provisions of Article 24, and will commence work train day at the time of arrival at such outside point in deadhead service."

We also ask that Article 9 be brought up to date with SP Article 12 (the latter as the result of settlements and Board Awards) by making Section 1(b), (c) and (d) of Article 12, reading:

> "(b) Engineers assigned to regular runs, who through no fault of their own are not used thereon account runs not operated in whole or in part, will be paid 100 miles at rate applying on locomotive on which last used for each day runs are scheduled or bulletined to operate.
>
> (c) Engineers assigned to regular runs, who through no fault of their own are not used thereon and their

runs are worked in whole or in part, will be allowed the full mileage of their assignments.

(d) Engineers assigned to regular runs or pool freight service, called at the instance of the company for service not included in their assignment, thus causing them to miss their regular run or turn, will be separately paid for each date on which earnings in other service does not equal earnings of assignment, not less than earnings of their assignment."

Section 1(b), (c) and (d) of Article 9, SD&AE Agreement.

[fol. 194] We also ask that Article 15 be brought up to date to conform to SP Article 19 by adding Notes 1 and 2 following Section 2, Article 19 as Notes 1 and 2 following Section 1(b), Article 15, SD&AE Engineers' Agreement. Said Notes read:

"NOTE (1): Engineers brought on duty in advance of the time specified in bulletin of assignment will be allowed a minimum of 100 miles for each time used, in addition to earnings of assignment. In each case rates and rules covering service performed will govern.

NOTE (2): Engineers brought on duty subsequent to time specified in bulletin of assignment will be paid from time specified in bulletin of assignment."

Your consideration will be appreciated.

Yours truly,

/s/ P. O. Peterson

POP:JM

cc—Mr. L. D. Salisbury
Mr. C. C. Cummins

[fol. 195]

EXHIBIT B TO AFFIDAVIT OF J. P. COLYAR

[Stamp—Received Jun 9 1944—P. O. Peterson]

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY

SAN DIEGO, CALIFORNIA

At Los Angeles, 14, Calif.

H. R. GERNREICH
VICE PRESIDENT AND
GENERAL MANAGER

DTB SD&AE/013-223 (Genl)

June 8, 1944

Mr. P. O. Peterson
General Chairman—B.L.E.
840 Pacific Building
San Francisco, 3, Calif.

Dear Sir:

Please refer to your letter of June 3, file E-10386-68, which has reference to Article 7, Article 9, and Article 15, San Diego & Arizona Eastern Engineers' Agreement.

I will give you my decision in this case as promptly as possible.

Yours truly,

/s/ H. R. GERNREICH

[fol. 196]

EXHIBIT C TO AFFIDAVIT OF J. P. COLYAR

[Handwritten Note—Confs—L.A.—9/23/44—Will think it over]

[Stamp—Received—Sep 22 1944—P. O. Peterson]

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY

SAN DIEGO, CALIFORNIA

At Los Angeles, 14, Calif.

H. R. GERNREICH
VICE PRESIDENT AND
GENERAL MANAGER

File: DTB SD&AE E&F 2-3

September 21, 1944

Mr. P. O. Peterson
General Chairman—B.L.E.
840 Pacific Building
San Francisco, 3, Calif.

Dear Sir:

Please refer to your letter of June 3, file E-10386-68, on which you request that certain changes and additions be made in Engineers' Agreement.

You request that the following be added to Article 7, Section (b), Engineers' Agreement:

> "Engineers deadheaded to an outside point to inaugurate service on an extra or unassigned work train, will be paid deadhead mileage under the provisions of Article 24, and will commence work train day at the time of arrival at such outside point in deadhead service."

I am not agreeable to adding the above to Article 7, Section (b), Engineers' Agreement.

You request that the following be added to Article 9 as Section 1(b), (c) and (d), Engineers' Agreement:

"(b) Engineers assigned to regular runs, who through no fault of their own are not used thereon account runs not operated in whole or in part, will be paid 100 miles at rate applying on locomotive on which last used for each day runs are scheduled or bulletined to operate.

"(c) Engineers assigned to regular runs, who through no fault of their own are not used thereon and their runs are worked in whole or in part, will be allowed the full mileage of their assignments.

"(d) Engineers assigned to regular runs or pool freight service, called at the instance of the company [fol. 197] for service not included in their assignment, thus causing them to miss their regular run or turn, will be separately paid for each date on which earnings in other service does not equal earnings of assignment, not less than earnings of their assignment."

I am agreeable to adding the first paragraph, (b), as Section 1(b), Article 9, Engineers' Agreement.

I am not agreeable to adding the second paragraph, (c), as Section 1(c), Article 9, Engineers' Agreement.

I am not agreeable to adding the third paragraph, (d), as Section 1(d), Article 9, Engineers' Agreement, however, I am agreeable to adding the following as Section 1(c), Article 9, Engineers' Agreement, to become effective upon reaching an understanding showing the work that may be included in the various assignments:

"Engineers assigned to regular runs or pooled freight service, called at the instance of the Company for service not included in assignment, thus causing them to miss their regular run or turn, will be paid not less than the earnings of their assignment for other service performed."

You request that the following notes be added to Article 15, Engineers' Agreement:

> "NOTE (1): Engineers brought on duty in advance of the time specified in bulletin of assignment will be allowed a minimum of 100 miles for each time used, in addition to earnings of assignment. In each case rates and rules covering service performed will govern."
>
> NOTE (2): Engineers brought on duty subsequent to time specified in bulletin of assignment will be paid from time specified in bulletin of assignment."

I am agreeable to adding Note (1) to Article 15, Engineers' Agreement, provided its provisions will not apply when it is necessary to readvertise, account change in starting time, roustabout assignments before they have been in existence six days, also with the understanding that the phrase, "each time used" is construed to include total time, regardless of the number of trips that may be made or the [fol. 198] nature of work performed, between the time an engineer is required to report for duty in advance of the advertised starting time and the advertised starting time of the assignment.

I am not agreeable to adding Note (2) to Article 15, Engineers' Agreement.

Yours truly,

/s/ H. R. Gernreich

[fol. 199]

EXHIBIT D TO AFFIDAVIT OF J. P. COLYAR

[Stamp—Received—Sep 27 1944—P. O. Peterson]

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY

SAN DIEGO, CALIFORNIA

At Los Angeles, 14, Calif.

H. R. GERNREICH,
VICE PRESIDENT AND
GENERAL MANAGER

DTB SD&AE 013-223 (Genl)

September 25, 1944

Mr. P. O. Peterson
General Chairman—B.L.E.
840 Pacific Building
San Francisco, 3, Calif.

Dear Sir:

Please refer to your letter of September 18 listing four cases you wished to discuss with me in conference, case No. 4 being as follows:

"4. E-10386-68 DTB SD&AE/013-223 (Genl)"

The contents of your letter of June 3 was discussed with you in conference in my office at Los Angeles September 23. During that discussion you stated that at the time the current Engineers' Agreement on the San Diego & Arizona Eastern Railway Co. was entered into Mr. Annable, who was then President and General Manager, advised you that if the proposed agreement were to be worded the same as the then current Pacific Lines Engineers' Agreement he desired to have the interpretations etc. made on the then current Pacific Lines Engineers' Agreement applied to the

proposed SD&AE Engineers' Agreement. You also advised that Mr. Annable wrote you stating that the interpretations etc. made on Pacific Lines Engineers' Agreement would be applicable to the SD&AE Engineers' Agreement.

I advised you that I did not know that that was the case, if it is, and that before the contents of your letter of June 3, 1944, was definitely determined I would endeavor to secure a copy of the letter you stated Mr. Annable wrote you and that if necessary, I would ask you to furnish a copy thereof.

I will endeavor to get a copy of that letter from Mr. Lamey and if I am not successful I will then make a request upon you for a copy thereof, after which I will give you a definite reply to your letter of June 3, 1944. In the meantime I will hold my letter of September 21 in abeyance, to be supplemented with a definite reply, after copy of the aforementioned letter is secured.

Yours truly,

/s/ H. R. Gernreich

[fol. 200]

EXHIBIT E TO AFFIDAVIT OF J. P. COLYAR

[Stamp—Received—Oct 23 1944—P. O. Peterson]

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY

SAN DIEGO, CALIFORNIA

At Los Angeles, 14, Calif.

H. R. GERNREICH,
VICE PRESIDENT AND
GENERAL MANAGER

DTB SD&AE 013-223 (Genl)

October 20, 1944

Mr. P. O. Peterson
General Chairman—B. L. E.
840 Pacific Building
San Francisco, 3, Calif.

Dear Sir:

Please refer to my letter of September 21, file DTB SD&AE E&F 2-3, which has reference to your letter of June 3, file E-10386-68, in which you request certain changes and additions be made in SD&AE Engineers' Agreement.

Also refer to my letter of September 25, file DTB SD&AE 013-223 (Genl), in which I advised you that I would endeavor to secure from Mr. Lamey a copy of the letter you stated you had received from Mr. Annable that the interpretations etc. made on the Pacific Lines Engineers' Agreement would be applied to the SD&AE Engineers' Agreement.

Mr. Lamey was unable to locate such a letter, therefore, as I mentioned to you in conference in my office September 23, and as mentioned in the third paragraph of my letter of September 25, I will appreciate your furnishing me a copy thereof.

Yours truly,

/s/ H. R. GERNREICH

[fol. 201]

EXHIBIT F TO AFFIDAVIT OF J. P. COLYAR

November 10, 1944

E-10386-68
DTB SD&AE 013-223
(Genl)

Mr. H. R. Gernreich
Vice President and General Manager
San Diego & Arizona Eastern Railway Company
277 Pacific Electric Building
Los Angeles 14, California

Dear Sir:

Referring to your letters September 25 and October 20, 1944, involving the rules proposed in our letter to you June 3, 1944, which rules were taken from the Southern Pacific Engineers' Agreement.

In conference with you September 23 I pointed out that the SD&AE Agreement was copied from the Southern Pacific Engineers' Agreement, except where otherwise noted, and that the application of the rules on the Southern Pacific would apply to the engineers on the SD&AE. I further stated that I believed we had a letter from Mr. Annable, with whom we negotiated the Agreement.

This is to advise that I have not located said letter, but I want to restate that when we negotiated the Agreement with Messrs. Annable and McIntyre it was clearly understood that whatever application of a rule was made on the Southern Pacific, said application would apply on the SD&AE in cases where the rules read alike.

The requested rules contained in our letter to you June 3, 1944 are all contained in the Southern Pacific Engineers' Agreement. At the time the SD&AE Engineers' Agreement was written we only had Section 1(a) of Article 12 of the present Southern Pacific Engineers' Agreement in force.

Section 1(b), (c) and (d) of SP Article 12 is the result of Board Awards where the Board sustained claims based on the former Article 12 which is identical to Article 9 of the SD&AE Agreement. The same applies to Notes 1 and 2 which we suggested be added to Article 19.

With reference to our suggested addition to Article 7 which was taken from a portion of Section 3(b), Article 8, SP Engineers' Agreement: As explained to you in conference, that proposal was a compromise reached on the Southern Pacific and without it continuous time would be paid at the highest rate.

[fol. 202] I am sure you will agree that where the Articles of the Agreements read alike it would be good business to have the same application under the rules. If you cannot agree to that we will, of course, have to handle each claim as it comes up which will mean an endless amount of work.

Under the circumstances I urge that you give this matter further consideration. What I have said with regard to the understanding reached when the Agreement was negotiated is the truth, and you will note that in the SD&AE Agreement we even put in the same examples as contained in the Southern Pacific Engineers' Agreement. That was at the request of Mr. Annable because he wished to have the Agreement complete and we concurred.

Yours very truly,

/s/ P. O. Peterson

POP:JM

cc—Mr. L. D. Salisbury
Mr. C. C. Cummins

[fol. 203]

EXHIBIT G TO AFFIDAVIT OF J. P. COLYAR

[Stamp—Received—Nov 20 1944—P. O. Peterson]

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY

SAN DIEGO, CALIFORNIA

At Los Angeles, 14, Calif.

H. R. GERNREICH,
VICE PRESIDENT AND
GENERAL MANAGER

DTB SD&AE 013-223 (Genl)

November 18, 1944

Mr. P. O. Peterson
General Chairman—B.L.E.
840 Pacific Building
San Francisco, 3, Calif.

Dear Sir:

Please refer to your letter of November 10, file E-10386-68, which has reference to your request that certain changes and additions be made in SD&AE Engineers' Agreement.

I will give you my decision in this case as promptly as possible.

Yours truly,

/s/ H. R. GERNREICH

[fol. 204]

EXHIBIT H TO AFFIDAVIT OF J. P. COLYAR

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY

SAN DIEGO, CALIFORNIA

At Los Angeles, 14, Calif.

H. R. GERNREICH,
VICE PRESIDENT AND
GENERAL MANAGER

DTB SD&AE E&F 2-7

December 19, 1944

Mr. P. O. Peterson
General Chairman—B.L.E.
840 Pacific Building
San Francisco, 3, Calif.

Dear Sir:

Referring to your letter of June 3, file E-10386-68, and subsequent correspondence ending with my letter of November 18, file DTB SD&AE 013-223 (Genl), which have reference to your request that certain changes and additions be made in SD&AE Engineers' Agreement.

You request that the following be added to Article 7, Section 3(b), Engineers' Agreement:

> "Engineers deadheaded to an outside point to inaugurate service on an extra or unassigned work train, will be paid deadhead mileage under the provisions of Article 24, and will commence work train day at the time of arrival at such outside point in deadhead service."

You request that the following be added to Article 9 as Section 1(b), (c) and (d), Engineers' Agreement:

> "(b) Engineers assigned to regular runs, who through no fault of their own are not used thereon

account runs not operated in whole or in part, will be paid 100 miles at rate applying on locomotive on which last used for each day runs are scheduled or bulletined to operate.

"(c) Engineers assigned to regular runs, who through no fault of their own are not used thereon and their runs are worked in whole or in part, will be allowed the full mileage of their assignments.

"(d) Engineers assigned to regular runs or pool freight service, called at the instance of the company [fol. 205] for service not included in their assignment, thus causing them to miss their regular run or turn, will be separately paid for each date on which earnings in other service does not equal earnings of assignment, not less than earnings of their assignment."

You request that the following notes be added to Article 15, Engineers' Agreement:

"NOTE (1): Engineers brought on duty in advance of the time specified in bulletin of assignment will be allowed a minimum of 100 miles for each time used, in addition to earnings of assignment. In each case rates and rules covering service performed will govern."

"NOTE (2): Engineers brought on duty subsequent to time specified in bulletin of assignment will be paid from time specified in bulletin of assignment."

Your request for these changes and additions was listed by you in your letter of September 18 asking for a conference to discuss this and other cases; this case being listed therein as follows:

"4. E-10386-68. DTB SD&AE/013-223 (Genl)."

We conferred on this case in my office at Los Angeles on September 23, at which time we reviewed my letter to you dated September 21 which was in reply to your letter of June 3. In my letter of September 21 I advised you that

I was agreeable to making some of the changes or additions requested and that I was not agreeable to making the other changes or additions requested.

You then stated that at the time the current SD&AE Engineers' Agreement was entered into Mr. Annabel stated to you that if the proposed agreement were to be worded the same as the then current Pacific Lines Engineers' Agreement, he desired to have the interpretations made upon the then current Pacific Lines Engineers' Agreement applied to the proposed SD&AE Engineers' Agreement, and that he wrote you to that effect, which letter you stated was in your files. I advised you I would endeavor to secure a copy of that letter and that if I could not locate it I would request you to furnish a copy thereof. I could not locate copy of that letter, and you advised me on November 10 that you could not locate it in your files.

[fol. 206] In deference to your statement that such an understanding was had between you and Mr. Annabel and that he so advised you in writing, although neither of us is able to locate that letter, I am agreeable, effective upon receipt of your concurrence, to making the above changes and additions as requested. I am also agreeable, effective upon receipt of your concurrence, to applying interpretations made on articles in Pacific Lines Engineers' Agreement that are similarly worded in SD&AE Engineers' Agreements to SD&AE Engineers' Agreement.

Upon receipt of your concurrence, necessary instructions will be issued.

Yours truly,

/s/ H. R. GERNREICH

cc—Cummins—7
Salisbury—3

[fol. 207]

EXHIBIT I TO AFFIDAVIT OF J. P. COLYAR

December 28, 1944

E-10386-68
DTB SD&AE E&F 2-7

Mr. H. R. Gernreich
Vice President and General Manager
San Diego & Arizona Eastern Ry. Co.
277 Pacific Electric Building
Los Angeles 14, California

Dear Sir:

This will acknowledge receipt of your letter December 19, 1944, in reply to my letters June [illegible] and November 10, regarding additions to Article 7, Section 3(b); Article 9, Section 1; and Article 12, SD&AE Engineers' Agreement.

I note you have granted the proposed additions, for which we thank you.

If consistent, I suggest that 12:01 AM, January 1, 1945, be made the effective date.

Yours very truly,

/s/ P. O. PETERSON

POP:JM

cc—Mr. L. D. Salisbury—2
Mr. C. C. Cummins

[fol. 208]

EXHIBIT J TO AFFIDAVIT OF J. P. COLYAR

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY

SAN DIEGO, CALIFORNIA

At Los Angeles, 14, Calif.

H. R. GERNREICH,
VICE PRESIDENT AND
GENERAL MANAGER

DTB SD&AE E&F 2-7

[Stamp—Received Jan 8 1945—P. O. Peterson]

January 4, 1945

Mr. P. O. Peterson
General Chairman—B.L.E.
840 Pacific Building
San Francisco, 3, Calif.

Dear Sir:

Please refer to your letter of December 28, file E-10386-68, which has reference to request that certain changes and additions be made in San Diego & Arizona Eastern Engineers' Agreement.

The changes and additions outlined in my letter of December 19 wil be placed in effect as of 12:01 AM, January 1, 1945.

Yours truly,

/s/ H. R. GERNREICH

[fol. 209]

EXHIBIT K TO AFFIDAVIT OF J. P. COLYAR

October 2, 1947

E&F 47-49
83

SUBJECT: Official Ballot Case No. 32-21. E-10928-12-1(c); 011-122-2—Claim of Engineer C. O. Calloway, San Joaquin Division for earnings of his assignment, February 24 to March 18, inclusive, 1945.

Mr. H. C. Hobart, Asst. Grand Chief Engineer
Mr. J. P. Colyar, General Chairman
Brotherhood of Locomotive Engineers
840 Pacific Building
San Francisco 3, California

Gentlemen:

The above subject was discussed in conference September 26, 1947. The facts in connection therewith are contained in Mr. Hughes' letters to Mr. Peterson of September 13 and November 5, 1945. Briefly, Mr. Calloway had been under the care of a Hospital Department physician for a year because of a heart involvement and under instructions to report for further examination. At such examination, staff physician at Los Angeles found his condition to be such as to warrant the more extensive examinations and treatments obtainable by the facilities and services available in the General Hospital.

Engineer Calloway reported at the General Hospital February 28, 1945, was released March 17, 1945 and performed service on his regular assignment March 20, 1945.

Our discussion developed that information received from the Hospital Department showed conclusively that Mr. Calloway, while in the Hospital was treated by being given bedrest and medication and was finally released after his condition showed improvement. In view of these facts, you stated the claim of Engineer Calloway is withdrawn.

We further advised you that with the understanding that it is the Company's responsibility to prescribe physical standards required of employes to qualify them for service and to remain in service, that we were agreeable in any case where an engineer was removed from his position on account of his physical condition and he desires the question [fol. 210] of his physical ability to conform to prescribed physical standards to be determined, the management was agreeable to setting up a special panel of doctors consisting of one doctor selected by the Company, one doctor selected by the employe or his representative, the two doctors thus selected to confer and appoint a third doctor specializing in the disease, condition or physical ailment from which the employe is alleged to be suffering. The management and the engineer to each defray the expenses of their respective appointee. The management and the engineer will each pay one-half the fee and traveling expenses of the third appointee. This panel of doctors upon completing their examination will make a full report in duplicate, one copy each to be sent the General Manager and the engineer. At the time of making the report a bill for the fee and traveling expenses, if there be any, of the third appointee shall be made in duplicate, one copy to be sent to the General Manager and one copy to the engineer.

Yours very truly,

(Signed) H. R. HUGHES
Assistant General Manager

(Signed) C. M. BUCKLEY
Assistant Manager of Personnel

Accepted:

(Signed) H. C. HOBART
Assistant Grand Chief Engineer, BLE

(Signed) J. P. COLYAR
General Chairman, BLE

cc—Mr. T. E. Bickers
Mr. C. W. Moffitt (3)

bc—Mr. J. W. Corbett
Mr. R. E. Hallawell
Mr. H. R. Hughes
Mr. B. W. Mitchell (3)—Your file is attached.

C. M. Buckley

GHK MLJ BSS EDM JJJ LPH HRG GAB VMP
HRH:epa

[fol. 211]

EXHIBIT L TO AFFIDAVIT OF J. P. COLYAR

(Letterhead of Southern Pacific Company,
San Francisco 5, California)

November 13, 1947

E&F 47-49

Subject: Official Ballot Case No. 32-21. E-10938-12-1(c), 011-122-2—Claim of Engineer C. O. Calloway, San Joaquin Division for earnings of his assignment, February 24 to March 18, inclusive, 1945.

Mr. G. W. Burbank, Asst. Grand Chief Engineer
Brotherhood of Locomotive Engineers
840 Pacific Building
San Francisco 3, California

Dear Sir:

The above subject was discussed in conference September 26 and November 12, 1947. The facts in connection therewith are contained in Mr. Hughes' letters to Mr. Peterson of September 13 and November 5, 1945. Briefly, Mr. Calloway had been under the care of a Hospital Department physician for a year because of a heart involvement and under instructions to report for further examination. At such examination, staff physician at Los Angeles found his condition to be such as to warrant the more extensive ex-

aminations and treatments obtainable by the facilities and services available at the General Hospital.

Engineer Calloway reported at the General Hospital February 28, 1945, was released March 17, 1945 and performed service on his regular assignment March 20, 1945.

Our discussion developed that information received from the Hospital Department showed conclusively that Mr. Calloway, while in the Hospital was treated by being given bed-rest and medication and was finally released after his condition showed improvement. In view of these facts, you stated the claim is withdrawn.

In our discussion of this matter we outlined the company's policy in the disposition of claims for time lost by engineers undergoing physical examinations as follows:

Physical examinations of engineers generally fall into three categories:

1) *The regularly scheduled periodic re-examinations to determine if they are qualified for service.*

For the convenience of engineers and other employees in taking these re-examinations without having to lay off, [fol. 212] medical examination car is operated over the system, and examining physicians are at practically all terminals and at most layover points.

Engineers who have opportunity, but fail to attend medical examination car or to report to examining physician for the regular scheduled periodical re-examination and who thereafter are held for such re-examination will not be paid for time lost.

When an engineer is held off his assignment by an officer of the company to take physical re-examination and he can establish that because his on-duty hours made it impossible for him to attend the medical examination car or secure the re-examination by an examining physician, he will be paid for time lost provided the examination does not reveal any condition that would have prevented him from continuing at work.

2) *Re-checks or treatments ordered by the chief surgeon; or his representatives, because of a physical condition or ailment that, if not regularly checked or treated, may result in the disqualification of the engineer for service.*

Re-checks coming within this category are in the sole interest of preserving and improving the health of the individual engineer in order that his impaired condition may not progress to a point resulting in his becoming disqualified for service. In these circumstances payment is not allowed for time lost in taking re-checks or treatments but the company will cooperate with the individual engineer to arrange for the taking of said re-checks or treatments without loss of time, if it is practicable and reasonable to do so.

3) *Cases where the officer in charge is of the opinion that the physical condition of an engineer is such as to justify a special examination, and an engineer is withheld from service and is required to report for such examination at a specified time.*

Engineers undergoing such examinations, and found to be in satisfactory physical condition to continue in service without interruption are compensated for any time lost. No compensation is allowed if, as the result of this examination, the engineer is required to refrain from working or to undergo treatment before returning to service.

We also stated to you that it will be the company's purpose to avoid loss of time to engineers for re-examinations and re-checks so far as in the judgment of the management that may be practicable without detriment to the service.

We are sure that you appreciate that the physical examinations are of material benefit to the employee as they [fol. 213] permit in many cases arresting of physical ailments which if allowed to continue without treatment may result in total and permanent disability.

We further advised you, with the understanding that it is the company's responsibility to prescribe physical standards

required of employees to qualify them for service and to remain in service, that we were agreeable in any case where an engineer was removed from his position on account of his physical condition and he desires the question of his physical ability to conform to prescribed physical standards to be determined, the management was agreeable to setting up a special panel of doctors consisting of one doctor selected by the company, one doctor selected by the employee or his representative, the two doctors thus selected to confer and appoint a third doctor specializing in the disease, condition or physical ailment from which the employee is alleged to be suffering. The management and the engineer will each defray the expenses of their respective appointee, and will each pay one-half of the fee and traveling expenses of the third appointee. This panel of doctors upon completing their examination will make a full report in duplicate, one copy each to be sent to the general manager and the engineer. At the time of making the report a bill for the fee and traveling expenses, if there be any, of the third appointee shall be made in duplicate, one copy to be sent to the general manager and one copy to the engineer.

Yours very truly,

/s/ H. R. HUGHES
Assistant General Manager

/s/ C. M. BUCKLEY
Assistant Manager of Personnel

Accepted:

/s/ G. W. BURBANK
Assistant Grand Chief Engineer, BLE

cc—Mr. T. E. Bickers

[fol. 214]

EXHIBIT M TO AFFIDAVIT OF J. P. COLYAR

(Letterhead of Brotherhood of Locomotive Engineers,
General Committee of Adjustment,
San Francisco 3, Calif.)

August 28, 1959

Org. File E-20037-32-3(b) SP
24-2(b) EP&SW
35-1 SD&AE

Mr. K. K. Schomp (6)
Manager of Personnel
Southern Pacific Company
San Francisco 5, California

Dear Sir:

This will serve as thirty days notice, as required by Section 6 of the Railway Labor Act, as amended and Article 36 of the agreement covering engineers on the Southern Pacific (Pacific Lines), Article 30 of the agreement covering engineers on the Former EP&SW, and Article 68 of the agreement covering engineers on the San Diego and Arizona Eastern, of the Committee's desire and intent to adopt the following as the second paragraph of Section 3(a), Article 32, SP engineers' agreement; the second paragraph of Section 2(b), Article 24 of the former EP&SW engineers' agreement, and as the second paragraph of Section 1, Article 35 of the SD&AE engineers' agreement:

> "When an engineer has been removed from his position or has been restricted from performing service to which he is entitled by seniority on account of his physical condition, and desires the question of his physical *fitness* Handwritten ~~condition~~ to be decided before he is permanently removed or restricted, he shall be privileged to have his case handled as follows:

"A special panel of doctors consisting of one doctor selected by the Company, one doctor to be selected by the employe or his representative, the two doctors to fitness confer and if they do not agree on the physical condition of the engineer, they shall select a third doctor specializing in the disease, condition or physical ailment from which the engineer is alleged to be suffering.

"Such panel of doctors shall fix a time and place convenient to the engineer, for the engineer to meet with them for examination. The decision of the majority of said panel of doctors of the engineers physical fitness to remain in service or have restrictions modified [fol. 215] shall be controlling on both the Company and the engineer. This does not however, preclude a re-examination at any subsequent time should the physical condition of the engineer improve.

"The doctors selected by the Company and the engineer or his representative shall be a specialist in the disease or ailment from which the engineer is alleged to be suffering.

"The Company and the engineer will be separately responsible for any expense incurred by the doctor of their choice. The Company and the engineer shall each be responsible for one-half of the fee and expense of the third member of the panel."

Please advise the time and place for initial conference.

Yours truly,

/s/ J. P. COLYAR

[Handwritten notation—Cy to L C & Sec.—SP-EP&SW & SD&AE—and—Mr. A. S. Traylor]

[fol. 216]

EXHIBIT N TO AFFIDAVIT OF J. P. COLYAR

[Stamps—J.P.C.—Nov 6 1959——Received—Nov 6 1959—B. of L.E.]

(Letterhead of Southern Pacific Company,
San Francisco 5, Calif.)

November 4, 1959

Org. File E-20037-32-3(b) SP
Co. File E&F 1-674
ER-32-3a-1-110

Mr. J. P. Colyar, General Chairman (4)
Brotherhood of Locomotive Engineers
Pacific Building
San Francisco 3, California

Dear Sir:

Reference is made to your letter of August 28, 1959, serving thirty days' notice, as required by Section 6 of the Railway Labor Act, as amended, and Article 36 of the agreement covering engineers, of the Committee's desire and intent to adopt as the second paragraph of Section 3(a), Article 32, of said agreement covering engineers, a provision to govern the handling to be accorded an engineer who has been removed from his position or who has been restricted from performing service to which entitled owing to his physical fitness, as set forth in your letter of August 28, which matter was discussed with you in conference on September 24, 1959.

In light of the understanding reached in the premises, we are, pursuant to your verbal request, November 3, 1959, attaching thirty-three (33) counterparts of agreement signed November 3, amending Section 3(a), Article 32, of

the agreement covering engineers, which agreement becomes effective December 1, 1959.

Please acknowledge receipt.

Yours truly,

/s/ L. M. Fox, Jr.

Encl.

cc: M. A. B. McNabney (5):

Attached for your information and file are five copies of the above-mentioned agreement.

/s/ L. M. Fox, Jr.

Encl.

[Handwritten notation—1 Cy each LC & Sec. S.P. Div.]

[fol. 217]

EXHIBIT O TO AFFIDAVIT OF J. P. COLYAR

E&F 1-674

AGREEMENT

between

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)
(Excluding Former El Paso and Southwestern System)

and its employes represented by the

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

* * * * * *

It is hereby understood and agreed that Section 3(a), Article 32, of the agreement between the above parties, covering rates of pay, rules, and working conditions, signed at San Francisco, California, July 14, 1958, and which became effective August 1, 1958, is amended by insertion of the following as the second, third, fourth, fifth, and sixth paragraphs thereof:

When an engineer has been removed from his position or has been restricted from performing service to which he is entitled by seniority on account of his physical fitness and desires the question of his physical ability to conform to prescribed standards to be determined before he is permanently removed or restricted, he shall be privileged to have his case handled as follows:

A special panel of doctors consisting of one doctor selected by the Company, one doctor to be selected by the employe or his representative, the two doctors to confer and if they do not agree on the physical condition of the engineer, they shall select a third doctor specializing in the disease, condition or physical ailment from which the engineer is alleged to be suffering.

Such panel of doctors shall fix a time and place for the engineer to meet with them for examination. The decision of the majority of said panel of doctors of the engineer's physical fitness to remain in service or have restrictions modified shall be controlling on both the Company and the engineer. This does not, however, preclude a reexamination at any subsequent time should the physical condition of the engineer change.

The doctors selected by the Company and the engineer or his representative shall be specialists in the disease or ailment from which the engineer is alleged to be suffering.

[fol. 218] The Company and the engineer will be separately responsible for any expense incurred by the doctor of their choice. The Company and the engineer shall each be responsible for one-half of the fee and expense of the third member of the panel.

This agreement is effective December 1, 1959, and cancels all settlements, rulings, understandings, and practices in conflict therewith.

Signed at San Francisco, California, this 3rd day of November, 1959.

For the Company:

/s/ K. K. Schomp
Manager of Personnel

For the Employes:

/s/ J. P. Colyar
General Chairman

Brotherhood of Locomotive Engineers

[fol. 219] Proof of Service by Mail (omitted in printing).

[fol. 220]

In the United States District Court

For the Southern District of California

Southern Division

No. 2459 SD W

[Title omitted]

Affidavit of F. J. Gunther—Filed June 5, 1962

State of California,
County of San Diego, ss.:

F. J. Gunther, being duly sworn, deposes and says:

I am petitioner in the above entitled cause and make this affidavit in support of my motion to be relieved from the operation of the judgment of this Court heretofore made and entered herein on October 27, 1961.

If called as a witness I would be competent to testify as follows:

For many years prior to my removal from active service by defendant on December 30, 1954, I was General Chair-

[File endorsement omitted]

man for the Brotherhood of Locomotive Firemen and Enginemen on the San Diego & Arizona Eastern Railway. At no time was I a member of the Brotherhood of Locomotive Engineers. My knowledge of the agreement between the San Diego & Arizona Eastern Railway and the Brotherhood [fol. 221] of Locomotive Engineers (hereinafter referred to as the SD&EA-BofLE agreement) was limited to those provisions thereof which were incorporated into the printed booklet which was submitted to this Court as Exhibit "A" to the affidavit of K. K. Schomp filed in the above matter on November 28, 1960, (the green-colored booklet containing rules effective March 1, 1935 with revised rates of pay effective October 1, 1937), and the printed booklet which was submitted to this Court as an exhibit to the affidavit of W. D. Lamprecht filed on or about February 13, 1958 in Action No. 2080-SD-W (the orange-colored booklet effective January 1, 1956, together with what additional information I obtained from time to time of changes or additions thereto agreed upon by the parties thereto. As a member of a rival labor organization, I was not provided by the Brotherhood of Locomotive Engineers with copies of all letters or other written memoranda evidencing changes or additions to said printed booklets, nor did I have access to the files of the Brotherhood of Locomotive Engineers or of the San Diego & Arizona Eastern Railway which contained such materials.

I have read the affidavit of J. P. Colyar submitted to the Court in support of the motion above referred to and the exhibits thereto.

At no time prior to reading said affidavit and exhibits was I aware of the October, 1947 agreement between the Southern Pacific Company and the Brotherhood of Locomotive Engineers (hereinafter referred to as the SP-BofLE agreement) to utilize a three-physician panel to determine disputes as to physical fitness of engineer employees as shown in exhibits K and L to said affidavit. For this reason I was unable to, and did not, advise my attorneys that,

as of October, 1947 or any other time prior to December 30, 1954, such a provision was a term of the SD&AE-BofLE agreement pursuant to the 1944 agreement between the [fol. 222] parties to that agreement to apply interpretations made on provisions of the SP-BofLE agreement to similarly worded provisions of the SD&AE-BofLE agreement as shown in exhibits A through J to said affidavit of J. P. Colyar.

At all times prior to reading said affidavit of J. P. Colyar it was my understanding that the SD&AE-BofLE agreement contained no specific provision for determining disputes as to physical fitness of locomotive engineers to continue in service by resort to a three-physician panel until January 1, 1956 when a provision was included as the last two paragraphs of Article 35 of the orange-colored booklet, "Agreement by and between the San Diego & Arizona Eastern Railway Company and its Locomotive Engineers represented by the Brotherhood of Locomotive Engineers effective January 1, 1956", which was attached to the affidavit of W. D. Lamprecht filed in Action No. 2080-SD-W on or about February 13, 1958.

F. J. Gunther

Subscribed and sworn to before me this 5 day of June, 1962.

Margit Nellaway, Notary Public, In and for the County of San Diego, State of California. My Commission Expires Oct. 1, 1963.

[fol. 223] Proof of Service by Mail (omitted in printing).

[fol. 224]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 2459 SD W

[Title omitted]

AFFIDAVIT OF CHARLES W. DECKER—Filed June 5, 1962

State of California,
City and County of San Francisco, ss.:

Charles W. Decker, being duly sworn, deposes and says:

I am one of the attorneys for petitioner in the above entitled matter and, in said capacity, have been the attorney who has prepared all of the pleadings and other documents filed with this Court, both in Civil Action No. 2080-SD-W and in Civil Action No. 2459-SD-W, on behalf of petitioner. I have also been the attorney to appear for petitioner in all but one of the court hearings held in both such actions.

The provisions of the agreement between the Southern Pacific Company and the Brotherhood of Locomotive Engineers, hereinafter referred to as the SP-BofLE agreement, and the provisions of the agreement between the San Diego & Arizona Eastern Railway Company and the Brotherhood of Locomotive Engineers, hereinafter referred to as the SD&AE-BofLE agreement, which are set forth in the affi-[fol. 225] davit of J. P. Colyar and the exhibits thereto and which provide for a three-physician panel to resolve disputes concerning the physical fitness of regularly assigned engineers were not brought to my attention until after Notice of Appeal from the Judgment of October 27, 1961 had been filed and said appeal docketed with the Circuit Court of Appeals for the Ninth Circuit. I learned of said provisions first on or about February 28, 1962 when I attended a conference at the office of J. P. Colyar, Chair-

[File endorsement omitted]

man of the General Committee of Adjustment, Brotherhood of Locomotive Engineers at his office located at 821 Market Street, San Francisco, California. At said conference I was advised by Mr. Colyar of said provisions.

Until said time it was my understanding that the green-covered booklet dated March 1, 1935, and containing the terms of the SD&AE-BofLE agreement as of November 30, 1938, contained all of the terms of the SD&AE-BofLE agreement as of December 30, 1954, the date of petitioner's separation from active service by defendant.

Said understanding was based upon the following facts. In my initial conferences with petitioner he advised me that for many years prior to his severance from active service by defendant he was General Chairman of the Brotherhood of Locomotive Firemen and Enginemen for the San Diego & Arizona Eastern Railway Company; that said labor organization had, as members, both firemen and locomotive engineer employees of said railway; that during his incumbency as General Chairman for said labor organization he had regularly processed claims against the San Diego & Arizona Eastern Railway on behalf of engineer employees and, in so doing, was asserting contractual rights of said employees based upon the collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and the Brotherhood of Locomotive Engineers. At one of said early conferences Mr. [fol. 226] Gunther provided me with a copy of the green-covered booklet dated March 1, 1935 containing the terms of said agreement as of November 30, 1938 and advised me that said booklet was a copy of the collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and the Brotherhood of Locomotive Engineers and that it contained all of the terms of employment by said railway company of its locomotive engineers in effect at the time he was removed from active service by defendant on December 30, 1954. At no time did he advise me of the possibility that said booklet did not contain all of the terms of the SD&AE-BofLE agreement in effect at said time.

This advice as to the terms of the SD&AE-BofLE agreement as of December 30, 1954 was confirmed to me by the representations made to this Court by defendant's representatives and attorneys in the course of court action No. 2080-SD-W and No. 2459-SD-W.

In paragraph IV of defendant's answer filed on or about May 27, 1957 in Action No. 2080-SD-W which, at said time, had not yet been transferred from the United States District Court for the Northern District of California, Southern Division, to this Court, defendant admitted that petitioner's employment with defendant was subject to the terms of a collective bargaining agreement by and between the San Diego & Arizona Eastern Railway Company and its locomotive engineers, represented by the Brotherhood of Locomotive Engineers, and admitted that there was no provision in said agreement relating to the age at which employees covered thereby should retire from active service.

In the pre-trial memorandum submitted by defendant's attorneys to this Court in Civil Action 2080 SD W on or about January 10, 1958, said attorneys stated, with reference to the applicable collective bargaining agreement:

> "There is no provision in the applicable collective bargaining contract restricting in any way the right and duty of the company to determine the physical fitness of its employees to perform their duties."

[fol. 227] In Supplementary Pre-Trial Memoranda filed by the parties on or about January 30, 1958 in said action 2080 SD W, petitioner indicated under the caption "portions of the Agreement Relied Upon by Petitioner" that certain portions of Articles 35, 38 and 47 as set forth in said green-colored booklet dated March 1, 1935, were the portions of the agreement relied upon by petitioner and defendant, in its memoranda, noted, at page 4, lines 6 through 8, that none of these articles in any way limited the right of the railroad to remove engineers from active service when it finds they are no longer qualified for such

service. On page 8 of that memorandum, counsel for defendant stated:

> "The contract between the defendant and the Brotherhood of Locomotive Engineers speaks for itself and clearly contains nothing depriving the company of this right and duty."

On or about February 13, 1958 defendant filed notice of motion and motion for summary judgment in Action No. 2080 SD W. In support thereof, the affidavit of W. D. Lamprecht was filed. The affidavit, in part, read as follows:

> "I am Vice-President of San Diego & Arizona Eastern Railway Company and am thoroughly familiar with its operations.
>
> I am familiar with the case of Mr. F. J. Gunther which is pending before this Court under the above-entitled number. I am also familiar with the collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and its locomotive engineers represented by the Brotherhood of Locomotive Engineers.
>
> In December, 1954, when Mr. Gunther last performed active service as a locomotive engineer, the applicable printed agreement was the green colored booklet dated March 1, 1935, which is on file with the Court as Defendant's Exhibit 1, together with amendments noted therein. Since the date of the aforementioned agreement there have been numerous amendments too voluminous to set forth. In lieu of setting out all of these amendments separately, I am attaching an orange-colored booklet by the same title, i.e., Agreement between San Diego & Arizona Eastern Railway Company and its Locomotive Engineers represented by the Brotherhood of Locomotive Engineers, effective January 1, 1956, which contains all of the aforementioned amendments. In so far as the latter booklet has any [fol. 228] applicability to this case, it represents the

agreement as it stood as of December 30, 1954, and any and all other dates material to this matter."

The last two paragraphs of Article 35 of the "orange-colored booklet" referred to by Mr. Lamprecht read as follows:

> "In case of a question of said engineer's mental or physical fitness to return to duty, and said engineer desires to submit to an examination, he shall be accorded the right to submit to a doctor appointed by the Company. If the Company's doctor finds said engineer unfit mentally or physically to return to duty he shall have the right of appeal to a special panel of doctors consisting of one doctor selected by the Company, one doctor selected by the employe or his representative, the two doctors thus selected to confer and appoint a third doctor specializing in the disease, condition or physical ailment which is alleged to prevent his return to duty. The findings of the majority of the doctors on said special panel of doctors will govern the right of the engineer to return to duty.
>
> "The management and the engineer will each defray the expenses of their respective appointee, and will each pay one-half of the fee and traveling expenses of the third appointee."

Affiant noted the statement of Mr. Lamprecht, contained in said affidavit, that "insofar as said booklet has any applicability to this case, it represents the agreement as it stood as of December 30, 1954, and any and all other dates material to this matter." However, in view of the earlier assertions of defendants representatives and attorneys in Action No. 2080-SD-W to the effect that, as of December 30, 1954 the applicable agreement contained no provision for a three doctor panel to determine the physical fitness of locomotive engineers to remain in active service, did not construe Mr. Lamprecht's statement to mean that the above-quoted paragraphs from Article 35 of the January 1, 1956 agreement, or a provision comparable thereto, were a part of the SD&AE-BofLE agreement as of December

30, 1954. And, as shown below, the representations of defendant's attorneys and representatives in this action confirmed to affiant that the three-physician panel provision was not a part of the SD&AE-BofLE agreement at any time prior to January 1, 1956.

[fol. 229] In his petition initiating Action No. 2459-SD-W, petitioner again did not set forth *in haec verbae* the provisions of the agreement upon which he relied but alleged simply that the terms of his employment were governed by the terms of the agreement by and between the San Diego & Arizona Eastern Railway Company and its locomotive engineers represented by the Brotherhood of Locomotive Engineers; that said agreement did not require employees covered by same to retire from active service at any stated age limit; and that by the terms of said agreement, at all times mentioned in the petition the petitioner had seniority rights which entitled him to continue in the active service of defendant as a locomotive engineer.

Without answering, on or about November 25, 1960, defendant gave notice of motion for summary judgment and moved for summary judgment. In support its motion, defendant submitted to this Court the affidavit of K. K. Schomp. Said affidavit, in part, read as follows:

> "I am Manager of Personnel of the San Diego & Arizona Eastern Railway Company and am thoroughly familiar with the collective bargaining agreement relating to the wages, rules and working conditions of its personnel. In my present position I represent the Company in negotiations with representatives of the employees, including the employees engaged in engine, train and yard service represented by the various operating brotherhoods.
>
> "I make this affidavit for use in connection with the motion for summary judgment filed by defendant in this action. I am familiar with the case of Mr. F. J. Gunther, which is pending before this Court under the above-entitled number. I am also familiar with the collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and the Brother-

hood of Locomotive Engineers. In December, 1954, when Mr. Gunther last performed active service as a locomotive engineer, the applicable printed agreement was a green colored booklet dated March 1, 1935, which was on file with the Court as Defendant's Exhibit 1 in Mr. Gunther's prior case (Civil No. 2080-SD-W). A copy of this agreement is attached as Exhibit A to [fol. 230] this affidavit. On December 30, 1954, there was no provision in the collective bargaining agreement applicable to the employment of Mr. Gunther providing for a three-doctor panel or for a medical review of any nature with respect to the findings of Company physicians and surgeons relating to the physical qualifications of locomotive engineers to perform service."

In its Memorandum of Points and Authorities submitted in support of said motion, commencing at page 14 thereof, counsel for defendant, by representing to the Court that the award of the National Railroad Adjustment Board, First Division, which petitioner sought enforcement of in said action, constituted an attempt on the part of the Board to "write a new contractual provision which would create a three-doctor panel and which would add terms to a contract under the guise of interpretation" in effect advised the Court that the SD&AE-BofLE Agreement as of December 30, 1954, contained no provision for resolving disputes as to an engineer's physical fitness by resort to a three-doctor panel.

Thereafter, on or about December 1, 1960, defendant submitted the Supplemental Affidavit of K. K. Schomp in support of said motion. Said affidavit read, in part, as follows:

"K. K. SCHOMP, being first duly sworn, deposes and says:

I am Manager of Personnel of San Diego & Arizona Eastern Railway Company and I have heretofore made

an affidavit in support of defendant's motion for summary judgment in this case.

As I stated in the affidavit dated November 23, 1960, the employment of Mr. F. J. Gunther at all times material to the pending action was subject to the collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and the Brotherhood of Locomotive Engineers, dated March 1, 1935, as amended. On December 30, 1954, the date on which Mr. Gunther was released from active service because of the doctor's report of his physical condition, the aforesaid collective bargaining agreement, including amendments thereto, contained no provision whatever relating to a three-doctor panel which could review the medical findings of the defendant's doctors with respect to the physical condition and ability of its locomotive engineers to operate its trains.

[fol. 231] Since December 30, 1954, there had been no such agreement or amendment until the agreement signed on November 3, 1959, to become effective December 1, 1959, a copy of which is attached as Exhibit A hereto, with the exception of amendment to Article 35, Section 3(c), of the applicable agreement, effective February 1, 1957, which had no application to the circumstances involved in the employment of Mr. Gunther, and which was predicated solely upon the prior institution of legal proceedings by an employee.

I enclose as Exhibit B hereto the demand of the Brotherhood of Locomotive Engineers which culminated in Exhibit A hereto. This demand is dated August 28, 1958, and seeks the inclusion of a three-doctor panel in the existing collective bargaining agreement to which I have heretofore referred."

Exhibits "A" and "B" to Mr. Schomp's Affidavit evidence an amendment to the SD&AE-BofLE Agreement effective December 1, 1959, and providing for resolution of disputes as to physical fitness by resort to a three-doctor panel. There was no indication in said affidavit of the earlier adop-

tion by the parties to the SP-BofLE Agreement of such a provision for that contract, as evidenced by Exhibits "K" and "L" to the Affidavit of J. P. Colyar filed and served herewith, and its incorporation into the SD&AE-BofLE Agreement by reason of the prior agreement of the parties thereto to adopt interpretations placed upon the SP-BofLE Agreement as evidenced by Exhibits "A" through "J" to the Affidavit of J. P. Colyar filed and served herewith.

This Court denied defendant's motion for summary judgment by Order of March 27, 1961. Said denial however was without prejudice to defendant's right to renew same on the ground that the award of the National Railroad Adjustment Board, First Division, sought to be enforced herein was in excess of the Board's jurisdiction in that it imposed upon defendant an obligation which was not to be found in the applicable agreement.

Defendant then answered the petition and, simultaneously therewith, filed a second motion for summary judgment. In its answer to petitioner's allegations of his con- [fol. 232] tractual right to remain in service, defendant, again, admitted that petitioner's employment was subject to the terms of a collective bargaining agreement by and between the San Diego & Arizona Eastern Railway Company and its engineers represented by the Brotherhood of Locomotive Engineers, and that said agreement contained no provision relating to the age at which employees covered thereby should retire from active service.

In support of said second motion for summary judgment, defendant submitted to this Court the Affidavit of K. K. Schomp, Manager of Personnel of the San Diego & Arizona Eastern Railway Company, which read in part as follows:

> "I am familiar with the case of Mr. F. J. Gunther, which is pending before this Court under the above-entitled number. I am also familiar with the collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and the Brotherhood of Locomotive Enginers. In December, 1954, when Mr. Gunther last performed active service as a locomotive

engineer, the applicable printed agreement was a green colored booklet dated March 1, 1935, which was on file with the Court as Defendant's Exhibit 1 in Mr. Gunther's prior case (Civil No. 2080-SD-W). A copy of this agreement has heretofore been filed with the Court in this case and copies have been distributed to petitioner's counsel and it is referred to herein as Exhibit "A" to this affidavit. On December 30, 1954, there was no provision in the collective bargaining agreement applicable to the employment of Mr. Gunther providing for a three-doctor panel or for a medical review of any nature with respect to the findings of Company physicians and surgeons relating to the physical qualifications of locomotive engineers to perform service."

. . .

"Prior to and since December 30, 1954, the collective bargaining agreement attached as Exhibit "A" has been the contract governing the employment of Mr. Gunther. Until December 1, 1959, this contract contained no provision creating a three-doctor panel to review the physical condition of a locomotive engineer who has been removed from his position or restricted from performing service for this reason on advice of the Company's physicians, nor for any other review of the decisions of the Company's physicians on the subject. This fact was recognized by a demand served upon the defendant company under date of August 28, 1959, by the Brotherhood of Locomotive Engineers through its General Chairman, Mr. J. P. Colyar. Mr. Colyar has at all material times represented the loco-[fol. 233] motive engineers employed by defendant for collective bargaining purposes. A copy of Mr. Colyar's demand is attached, together with the amending agreement of December 1, 1959, as Exhibit "C"."

Again, although defendant discloses the existence of a contractual provision for a three-physician panel to be resorted to in the event of disputes as to physical fitness, effective December 1, 1959, there is failure to advise the

Court of the existence of such a provision as early as November 13, 1947, as demonstrated by the Affidavit of J. P. Colyar filed and served herewith. Consistent with the contents of Mr. Schomp's Affidavit of May 11, 1961, counsel for defendant, in their memorandum of points and authorities submitted to this Court in support of the second motion for summary judgment in Civil Action No. 2459-SD-W, advised the Court as follows:

> "The entire collective bargaining agreement upon which the parties hereto rely is the booklet attached as Exhibit "A" to the affidavit of Mr. K. K. Schomp, which is filed in support of this motion. It contains no provision whatever creating a three-doctor panel to review the decision of the carier's physicians with respect to the physical fitness of its locomotive engineers to operate engines and trains."
>
> . . .
>
> "Mr. Schomp's affidavit declares that there has been no pertinent amendment to the applicable contract (Exhibit "A") until December 1, 1959; that the latter amendment is attached to the affidavit as Exhibit "C"; and that by virtue of Exhibit "C" the applicable collective bargaining agreement for the first time provided for a three-doctor panel review of a decision of the company's physicians as to whether a locomotive engineer is physically disqualified from performing active service. It is clear that there would have been no occasion for such an amendment if there had been a provision for such a review in the agreement. It is significant to note that petitioner cannot challenge this statement in an affidavit."

The contents of the Affidavit of Petitioner, F. J. Gunther, in opposition to defendant's second motion for summary judgment dated May 26, 1961, are consistent with the contents of his affidavit filed and served simultaneously herewith, in that in the affidavit of May 26, 1961, he reiter-
[fol. 234] ates his reliance upon Articles 35, 47 and 38 of the SD&AE-BofLE Agreement of March 1, 1935 and does

not refer to the subsequent amendment of said agreement by the addition of a provision for adjudicating disputes as to physical fitness by resort to a three-physician panel as evidenced by Exhibits "A" through "L" to Mr. Colyar's affidavit filed and served herewith.

Finally, affiant participated in the oral argument upon defendant's second motion for summary judgment which took place on May 29, 1961. At said time, the Court requested affiant to advise it of the language contained in the SD&AE-BofLE Agreement of March 1, 1935, which petitioner relied upon and affiant, referring to the green-covered booklet, pointed to Articles 35, 47, 38 as set forth therein. At said argument, counsel for defendant represented to the Court that said green-covered booklet contained all of the provisions of the applicable agreement pertinent to the issues raised by the petitioner and failed to advise the Court of the existence of the provision for resort to a three-physician panel to resolve disputes as to physical fitness by addition of such a provision to the 1935 agreement as indicated by the Affidavit of J. P. Colyar and the exhibits thereto filed and served herewith.

I relied upon the foregoing advice received from petitioner and representations of defendant's representatives and attorneys in my conduct, on behalf of petitioner, of Actions 2080-SD-W and 2459-SD-W and at no time prior to said conference with Mr. J. P. Colyar of the Brotherhood of Locomotive Engineers did I receive information indicating that the controlling contractual provisions were to be found elsewhere than in said green-covered booklet.

Dated: June 1, 1962.

Charles W. Decker.

Subscribed and sworn to before me this 1st day of June, 1962.

Alice L. O'Connor, Notary Public in and for the City and County of San Francisco, State of California. (Seal) My Commission Expires April 17, 1964.

[fol. 235] Proof of Service by Mail (omitted in printing).

[fol. 236]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil No. 2459-SD-W

[Title omitted]

AFFIDAVIT OF C. M. BUCKLEY—Filed July 9, 1962

State of California,
County of San Mateo, ss.

C. M. Buckley, being first duly sworn, deposes and says:

I am a citizen of the United States and of the State of California, residing in San Mateo County. On November 30, 1957, I retired from the service of Southern Pacific Company as Assistant to Vice President-System Operations.

I have read the affidavits of Messrs. Colyar, Gunther and Decker which were filed in the above-mentioned proceeding within the last month in support of the Motion for Relief from Operation of Judgment pursuant to Rule 60(b). I am thoroughly familiar with the collective bargaining agreements to which they refer and with the facts and circumstances involved in this matter. Throughout the period [fol. 237] covered by Exhibits "A" through "L" to Mr. Colyar's affidavit I was Assistant Manager of Personnel, Southern Pacific Company, directly charged with the negotiation and administration of the collective bargaining agreements relating to the employment of engineers and firemen employed by Southern Pacific Company. My signature appears in such capacity in both Exhibits "K" and "L" to the said affidavit.

My service with Southern Pacific Company commenced on July 22, 1903, as engine wiper. Thereafter, I was em-

[File endorsement omitted]

ployed as fireman in August of 1905, and was promoted to locomotive engineer on June 18, 1916. Thereafter, I served as Assistant Trainmaster at El Centro, California, in 1929 and 1930, then returned to engine service as a locomotive engineer until January 1, 1940, when I was appointed Assistant Manager of Personnel, with headquarters at San Francisco, California. On April 1, 1940, I was designated to represent the Company in negotiations with representatives of the employees in engine service. I continued in this capacity until my appointment to the position of Assistant to Vice President in Charge of Operations on August 16, 1954. In the latter capacity and until my retirement in 1957, I was assigned to handle matters involving collective bargaining agreements and negotiations on a national scale.

During this period of service I occupied the position of Local Chairman, Brotherhood of Locomotive Firemen and Enginemen, Los Angeles Division, Southern Pacific Company, in 1915. Thereafter, in February of 1922, I was elected Local Chairman, Brotherhood of Locomotive Engineers, and served in this position on the Los Angeles Division until 1928, and again from 1934 to 1939, at which time I was elected Vice General Chairman, General Committee, Brotherhood of Locomotive Engineers, Southern Pacific Company, in which position I served until my appointment as Assistant Manager of Personnel by the Company.

[fol. 238] In 1947, during disposition of matters involved in Brotherhood of Locomotive Engineers Official Strike Ballot dated January 6, 1947, I was a Southern Pacific Company representative in negotiating settlement of numerous claims and grievances listed by the Brotherhood of Locomotive Engineers in said Official Strike Ballot, among which claims was that of Engineer C. O. Calloway for compensation for time lost owing to his having been required by the Company to report to the General Hospital for physical examination. While there was no rule contained in the collective bargaining agreement applicable to engineers employed by the Southern Pacific Company to govern in the disposition of such claims, it had been the policy of the Company, under certain circumstances, to pay en-

gineers for time lost while undergoing physical examination and, under other circumstances involving physical examination, to decline payment of such claims. Under the factual situation involved in the claim of Engineer Calloway, Company policy would not permit payment of the claim, and during conferences on September 26 and November 12, 1947 (see Exhibits "K" and "L" attached to Mr. Colyar's affidavit), in recognition of the application of Company policy said claim was withdrawn by Brotherhood of Locomotive Engineers representatives.

At those conferences I participated in discussions with Brotherhood of Locomotive Engineers representatives, including Mr. Colyar, concerning matters involving other aspects of the question of the Company's right to prescribe physical standards for its engineers. During said discussions the question of restriction of an engineer's seniority owing to his removal from his position account of his physical condition not meeting prescribed Company standards arose and was eventually disposed of by our agreement, during conference with Brotherhood of Locomotive Engineers representatives, that in such cases in the future a three-doctor panel would be provided in event an engineer [fol. 239] desired the question of his physical ability to conform to prescribed physical standards to be determined. Agreement on such new rule was confirmed by Company representatives and accepted by Brotherhood of Locomotive Engineers representatives on October 2, 1947 (see Mr. Colyar's Exhibit "K"), and November 13, 1947 (see Mr. Colyar's Exhibit "L").

At no time during negotiation of the new rule involving the three-doctor panel was any portion thereof considered by either the Company or Brotherhood of Locomotive Engineers negotiators to constitute an interpretation of Article 12 of the collective bargaining agreement applicable to Southern Pacific engineers or of any other rule then existing in said collective bargaining agreement or in any other agreement, but was in itself an entirely new rule negotiated solely to apply to engineers on the Southern Pacific Company (Pacific Lines).

To my knowledge the said new rule had not been negotiated to apply as a part of the collective bargaining agreement applicable to engineers on the San Diego and Arizona Eastern Railroad on or prior to August 15, 1954, the date of my last employment as Assistant Manager of Personnel with the Southern Pacific Company.

C. M. Buckley

(Signature illegible.) Notary Public in and for the County of San Mateo, State of California.

James W. Archer, Notary Public in and for the County of San Mateo, State of California.

[fol. 240]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil No. 2459-SD-W

[Title omitted]

AFFIDAVIT OF K. K. SCHOMP—Filed July 9, 1962

State of California,
City and County of San Francisco, ss.

K. K. Schomp, being first duly sworn, deposes and says:

I am Manager of Personnel of the San Diego & Arizona Eastern Railway Company (SD&AE) and I have heretofore made an Affidavit on November 25, 1960, and a Supplemental Affidavit on December 1, 1960, in support of defendant's motion for summary judgment in the case of Mr. F. J. Gunther.

I am also Manager of Personnel of the Southern Pacific Company (Pacific Lines) (S.P.) and am thoroughly familiar with the collective bargaining agreement relating to the

[File endorsement omitted]

wages, rules, and working conditions of engineers employed by the Southern Pacific Company (Pacific Lines).

[fol. 241] I have read the Affidavits of Mr. J. P. Colyar, Mr. C. W. Decker, and Mr. F. J. Gunther, filed and served June 4, 1962, with petitioner's Notice of Motion For Relief From Final Judgment in Civil Action No. 2459-SD-W, and, regardless of any arguments contained in said Affidavits, I again affirm that on December 30, 1954, there was no provision in the collective bargaining agreement applicable to the employment of Mr. Gunther providing for a three-doctor panel or for a medical review of any nature with respect to the findings of Company physicians and surgeons relating to the physical qualifications of locomotive engineers to perform service.

Mr. Colyar attaches as his Exhibits "H" and "I" an agreement between SD&AE and the Brotherhood of Locomotive Engineers (BLE) that interpretations of existing S.P. agreement provisions would apply to similarly worded SD&AE agreement provisions thereafter. Exhibits "K" and "L" to Mr. Colyar's affidavit are documents creating a new agreement provision on S.P. which was never extended to SD&AE. An agreement providing for a three-doctor panel was thereafter negotiated on SD&AE between Mr. J. P. Colyar and Mr. L. M. Fox, Jr., who represents me in the handling of matters involving the collective bargaining agreement applicable to engineers on the SD&AE. A copy of this agreement is attached as a part hereof as Exhibit "A".

Furthermore, the three-doctor panel agreement which was created on S.P. by the letters attached as Exhibits "K" and "L" to Mr. Colyar's affidavit has never been interpreted on S.P. from 1947 to the present date.

K. K. Schomp

Subscribed and sworn to before me this 6th day of July, 1962.

Norman T. Stone (Notarial Seal), Notary Public in and for the City and County of San Francisco, State of California.

[fol. 242] CLERK'S NOTE:

Exhibit A to Affidavit of K. K. Schomp, "Agreement between San Diego and Arizona Eastern Railway Company and its engineers represented by the Brotherhood of Locomotive Engineers signed on November 3, 1959" is omitted from the record here as it appears on pages 17-19 supra.

[fol. 244]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil No. 2459-SD-W

[Title omitted]

AFFIDAVIT OF C. A. BALL, JR.—Filed July 9, 1962

State of California,
City & County of San Francisco, ss.:

C. A. Ball, Jr., being first duly sworn, deposes and says:

I am First Assistant Manager of Personnel on the staff of the Manager of Personnel of the Southern Pacific Company, a position I have held since January 1, 1958. Prior to 1947 I was employed by the Company as a locomotive fireman, engineer and road foreman of engines for approximately ten years. On October 1, 1947, I was first appointed to said staff as Assistant Manager of Personnel and until August 16, 1954, assisted Mr. C. M. Buckley, the Assistant Manager of Personnel delegated at that time with responsibility for the administration of the collective bargaining agreement covering engineers employed by the [fol. 245] Southern Pacific Company (Pacific Lines). On August 16, 1954, upon the promotion of Mr. Buckley, I assumed the responsibility previously delegated to him and served in that capacity until January 1, 1958.

I am familiar with the case of Mr. F. J. Gunther and have read the affidavits of Messrs. Colyar, Decker, and

[File endorsement omitted]

Gunther which have been filed in support of the Motion for Relief from Operation of Judgment and am thoroughly familiar with the collective bargaining agreements referred to in said affidavits.

I have dealt with matters involving the application of agreements covering locomotive engineers of the Southern Pacific Company (Pacific Lines) during the entire existence of the letters of agreement dated October 2, 1947, Mr. Colyar's Exhibit "K", and November 13, 1947, Mr. Colyar's Exhibit "L", and at no time from the inception thereof to the present has any part of the agreement thereby evidenced been considered to constitute an interpretation of any provision, including Article 12, of the agreement covering Southern Pacific Company locomotive engineers. It has always been my understanding that the letter agreement of November 13, 1947, constituted a statement of Company policy to apply in the disposition of claims of its engineers arising when engineers lose time as a result of being required by the Company to take physical examinations to determine whether their physical condition meets prescribed standards, plus the last paragraph which is a new rule providing a three-doctor panel in cases arising where a Southern Pacific locomotive engineer who has been removed from service because his physical condition did not meet Company requirements; and where such an engineer desires the question of his physical ability to meet such requirements to be reviewed by a three-doctor panel. I have never been advised by Mr. Colyar or any representative of the Brotherhood of Locomotive Engineers of an understanding on their part contrary to my understanding in the premises.

The first and only provision for a three-doctor panel to [fol. 246] apply to an engineer on the SD&AE under the factual circumstances of the Gunther case was the new rule negotiated effective December 1, 1959, to become the second paragraph of Section 1 of Article 35 of the collective bargaining agreement applicable to locomotive engineers employed by the SD&AE.

C. A. Ball, Jr.

Subscribed and sworn to before me this 6th day of July, 1962.

Norman T. Stone (Notarial Seal), Notary Public in and for the City and County of San Francisco, State of California. My commission expires October 25, 1964.

[fol. 247]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil No. 2459-SD-W

[Title omitted]

AFFIDAVIT OF L. M. FOX, JR.—Filed July 9, 1962

State of California,
County of San Mateo, ss.:

L. M. Fox, Jr., being first duly sworn, deposes and says:

I am Assistant Manager of Personnel on the staff of Mr. K. K. Schomp, Manager of Personnel of the Southern Pacific Company (Pacific Lines), and since January 1, 1958, have been delegated by Mr. Schomp with responsibility for the administration of agreement provisions governing rates of pay, rules, and working conditions of engineers employed by that Company. Since 1954 I have been directly concerned in handling of matters involving this agreement. I commenced my employment with the company in 1941 as a locomotive fireman on the Shasta Division, was promoted to locomotive engineer with a seniority date in 1946 and thereafter received appointments as enginemen's instruc-
[fol. 248] tor and assistant road foreman of engines on that Division. From and since August 16, 1954, I have been an Assistant Manager of Personnel.

Mr. Schomp, as manager of Personnel of the San Diego and Arizona Eastern Railway Company, has delegated me to represent him in the handling of matters arising from

[File endorsement omitted]

the administration of the collective bargaining agreement applicable to engineers employed by that Company.

I am familiar with the case of Mr. F. J. Gunther and have read the affidavits of Messrs. Gunther, Colyar, and Decker which were filed herein in support of the Motion for Relief from Operation of Judgment. I am thoroughly familiar with the collective bargaining agreement applicable to locomotive engineers employed by the San Diego and Arizona Eastern Railway (SD&AE) and with the collective bargaining agreement applicable to locomotive engineers employed by the Southern Pacific Company (Pacific Lines) (SP).

There existed, as a part of the collective bargaining agreement applicable to Mr. Gunther, no provision for such three-doctor panel to apply in like circumstances until the rule which was negotiated between Mr. Colyar and me became effective December 1, 1959, as the second paragraph of Section 1, Article 35, of the collective bargaining agreement covering locomotive engineers on the SD&AE (Exhibit A to the affidavit of Mr. Schomp filed herewith).

Said new rule originated from Mr. Colyar's demand served on this defendant company dated August 28, 1959, which was also served on the Southern Pacific Company. The initial conference in connection with the demand served upon both companies was held in my office, Room 258, 65 Market Street, San Francisco, California, on September 24, 1959. At the beginning of such conference I questioned Mr. Colyar as to his reason for serving a demand for a three-doctor panel rule on the Southern Pacific Company in view of the fact that such rule existed, applicable to Southern Pacific engineers, in the letter agreement [fol. 249] of November 13, 1947 (Mr. Colyar's Exhibit "L"). Mr. Colyar stated that it was the Organization's desire to broaden the rule to cover those engineers who are limited to the performance of certain work owing to their physical condition. Regarding the demand served on the SD&AE, Mr. Colyar stated that it was the Organization's desire to negotiate a rule to provide a three-doctor panel to apply to engineers employed by the SD&AE. He farther stated that it was desired that said rule be identi-

cal with the Southern Pacific Company rule in order to "standardize" the collective bargaining agreements administered by the Brotherhood of Locomotive Engineers General Committee of Adjustment, of which he is Chairman.

At no time during said negotiations did Mr. Colyar indicate in any manner that he considered the letter agreements dated October 2 and November 13, 1947, to be applicable to engineers of the SD&AE. All discussion between us regarding the demand for a provision for a three-doctor panel to be included in the collective bargaining agreement applicable to engineers of the SD&AE was on the basis that such was a new rule to be included in said agreement without the prior existence of any part thereof.

The letter agreements of October 2 and November 13, 1947, do not constitute an interpretation of Article 12 of the collective bargaining agreement covering engineers of the Southern Pacific Company and have not been applied to engineers of that Company as an interpretation of said Article 12.

L. M. Fox, Jr.

Subscribed and sworn to before me this 6th day of July, 1962.

Norman T. Stone, Notary Public in and for the County of San Mateo, State of California.

[fol. 250]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil No. 2459-SD-W

[Title omitted]

AFFIDAVIT OF W. A. GREGORY—Filed July 9, 1962

I am one of the attorneys for defendant in the above-entitled matter and have been directly involved in this

[File endorsement omitted]

proceeding since its inception. I have read the affidavits of Charles W. Decker, J. P. Colyar and F. J. Gunther which have been filed with the Court in connection with petitioner's Motion for Relief From Operation of Judgment Pursuant to Rule 60(b), F.R.C.P., which motion is allegedly based upon excusable negligence and newly discovered evidence.

There is no proper basis whatever for petitioner's motion. At no time prior to December 1, 1959, was there any provision in the collective bargaining agreement between the Brotherhood of Locomotive Engineers and the San Diego & Arizona Eastern Railway Company which had any application whatever to the circumstances involved in [fol. 251] the employment of Mr. Gunther. This fact appears in the various memoranda filed with this Court by the attorneys for defendant, as is more particularly set forth in Mr. Decker's affidavit, and further appears in the sworn affidavits of Mr. W. D. Lamprecht, Vice President of defendant, and Mr. K. K. Schomp, Manager of Personnel of defendant, as is more particularly referred to in Mr. Decker's affidavit. This fact is substantiated by the affidavit of Mr. J. P. Colyar, to which I have already referred, since the facts upon which he relies show conclusively that there was no three-doctor panel provision in the San Diego & Arizona Eastern Railway Company agreement with its locomotive engineers at any time material to Mr. Gunther's case. The facts alleged by Mr. Colyar do not support any conclusion that such a three-doctor panel existed on San Diego & Arizona Eastern Railway. Instead, Mr. Buckley's affidavit herein demonstrates that Messrs. Colyar, Gunther and Decker are attempting to do the very thing which this Court has already denied in the judgment from which relief is sought, viz., attempting to write an agreement provision into the San Diego & Arizona Eastern Railway Company agreement under the guise of interpretation. The National Railroad Adjustment Board cannot do this. Petitioner cannot do this either.

In view of the foregoing, Mr. Decker is in no position to characterize the representations made to this Court by

defendant's representatives and attorneys either as erroneous or as intentional misrepresentations.

Nor is Mr. Decker in a position to contend that he could not by due diligence have discovered any or all of the "evidence" to which he refers. Exhibits "A" through "L" were papers written by or to, or participated in by, the Brotherhood of Locomotive Engineers between 1944 and 1947. Mr. Decker points out in his affidavit (page 2, lines 19 through 31) that Mr. Gunther was General Chairman of the Brotherhood of Locomotive Firemen and Enginemen representing [fol. 252] employees of defendant, and regularly processed claims against defendant on behalf of locomotive engineer employees asserting their contractual rights based upon the locomotive engineers' agreement. In these circumstances, Mr. Gunther must have known that amendments to the agreement are made between the parties which are included in the next reprinting of the full agreement. This is apparent to anyone, for example, from an examination of Exhibit "A" to the Supplemental Affidavit of K. K. Schomp filed herein in the month of December 1960. Throughout the case there also has been repeated reference to the amendment to Article 35, Section 3(c), effective February 1, 1957, an intermediate amendment (which has no application to the circumstances of the instant case).

Under date of March 29, 1960, Mr. J. P. Colyar addressed a letter to Mr. K. K. Schomp, Manager of Personnel of defendant, enclosing a document signed by Mr. Gunther authorizing the Brotherhood of Locomotive Engineers to represent him in handling his alleged grievance to a conclusion. A copy of said letter and authorization, witnessed by Mr. J. P. Colyar on said date, is attached as Exhibit "A" and is incorporated herein. A copy of defendant's reply of April 6, 1960, is attached as Exhbiit "B" and incorporated herein. Thereafter, on April 15, 1960, Mr. Colyar met in San Francisco with representatives of defendant, Mr. Denton and me in connection with this matter. Mr. Colyar advised that Exhibits "A" and "B" had been referred to Mr. Decker who was handling the legal portion of the case. The petition, No. 2459-SD-W, was filed with

this Court on September 26, 1960, and was served upon defendant on November 14, 1960. It is apparent that even if Mr. Gunther did not know about the existence of Exhibits "A" through "L", he cannot deny that Mr. Colyar and the Brotherhood of Locomotive Engineers, who were authorized in writing to represent him and who were in communication with Mr. Decker, had all the necessary information [fol. 253] in this regard long before the last petition was even filed in this Court. With due and reasonable diligence Mr. Decker could have developed any such information. There is no basis for the instant motion under Rule 60(b) of the Federal Rules of Civil Procedure.

Page 5, lines 4 through 15, of Mr. Decker's affidavit refers to the last two paragraphs of Article 35 of the orange colored booklet referred to by Mr. Lamprecht and attached as an exhibit to his affidavit. A glance at said booklet will at once demonstrate that the said three-doctor board provision (1) has no application to the circumstances of Mr. Gunther's case, (2) involves only a situation where legal proceedings are instituted, and (3) simply contains the provisions heretofore set forth as Exhibit "B" to the Supplemental Affidavit of Mr. K. K. Schomp filed in support of defendant's motion for summary judgment dated December 1, 1960. The pages of the said orange colored booklet which include the said rule contain the wording "Revised, effective February 1, 1957".

I declare under penalty of perjury that the foregoing is true and correct.

W. A. Gregory.

Dated: San Francisco, California, July 6, 1962.

[fol. 254]

EXHIBIT A TO AFFIDAVIT OF W. A. GREGORY

SD&AE E&F 154-466

[Stamp—C. A. B.—Mar 30 1960]

(Letterhead of Brotherhood of Locomotive Engineers, General Committee of Adjustment, San Francisco 3, Calif.)

March 29, 1960

Org. File E-13004-35-1 SD&AE
Co. File SD&AE 154-466

Mr. K. K. Schomp (2)
Manager of Personnel
San Diego & Arizona Eastern Ry. Co.
San Francisco, Calif.

Attention—Mr. L. M. Fox, Jr.

Dear Sir:

Please refer to my letter of November 5, 1958, requesting that you advise the date on which Engineer F. J. Gunther was restored to service, in accordance with Award 17646 and the interpretation of the National Railroad Adjustment Board, First Division, and your reply dated November 6, 1958, declining the information for the reason stated therein.

In order to clear up the question of jurisdiction, am enclosing herewith a form certifying the Brotherhood of Locomotive Engineers as Mr. Gunther's representative in handling this case.

In view of this factor, you are now requested to advise whether or not you intend to comply with the Award as interpreted by Referee Stone on October 8, 1958, and reinstate Engineer Gunther and pay him for time lost from October 15, 1955, pursuant to the applicable rule on the property.

While you have advised by your letter (without date) received in this office May 14, 1959, that the defendant Company filed a motion for summary judgment and on April 8, 1959, the Federal Court at San Diego granted such a judgment, we understand such judgment was against the Award itself dated October 2, 1956, and not the interpretation dated October 8, 1958.

Yours truly,

/s/ J. P. COLYAR

[fol. 255]

San Francisco, California
(Location)

March 28, 1960
(Date)

Docket No. 33531—Award 17646 and interpretation
N. R. A. Board, First Division

TO WHOM IT MAY CONCERN:

I hereby authorize the Brotherhood of Locomotive Engineers and any and all of its duly constituted representatives to represent me in handling to a conclusion the following grievance, submitted by me through Division No. 515 of the Brotherhood of Locomotive Engineers, with any and all representatives of the San Diego and Arizona Eastern Railway Company, and hereby grant full and complete authority to the said Brotherhood of Locomotive Engineers and its representatives to act for me and in my name for the purpose of collecting, settling, compromising, amending, dismissing or in any other manner disposing of such grievance; and, further, I hereby authorize the said Brotherhood of Locomotive Engineers and its representatives to submit such grievance for determination to any person, board or other tribunal provided by law or otherwise, which to them may be deemed necessary or advisable, and hereby give full and complete authority to the said Brotherhood of Locomotive Engineers and its representatives to receive notice of hearings, if any, or to waive hearings, and to ap-

pear for, represent and act for me before such person, board or other tribunal in connection with the consideration and determination of such grievance:

STATEMENT OF CLAIM OR COMPLAINT

Request the enforcement of Award 17646 of the National Railroad Adjustment Board, First Division, as interpreted.

/s/ FRED J. GUNTHER
(Signature of Claimant)
Member of 97, BLF&E
Mar 28 1960

Witness

/s/ J. P. COLYAR
(Signature of Claimant)
3/28/60

[fol. 256]

EXHIBIT B TO AFFIDAVIT OF W. A. GREGORY

COPY

(SD&AE Letterhead)

65 Market Street
San Francisco, California

Manager of Personnel

Org. File E-13004-35-1 SD&AE
Co. File SD&AE E&F 154-466

April 6, 1960

Mr. J. P. Colyar, General Chairman
Brotherhood of Locomotive Engineers
Pacific Building
San Francisco 3, California

Dear Sir:

This is in reply to your letter of March 29, 1960, with which you enclosed a form signed by Mr. F. J. Gunther authorizing you to act on his behalf in "requesting enforce-

ment of Award 17646 of the National Railroad Adjustment Board, First Division, as interpreted". As you point out in your letter, on April 8, 1959, the Federal Court at San Diego granted summary judgment in favor of the defendant company on Award 17646. I am advised by counsel that the so-called "Interpretation", which was subsequently issued by the Board under the same number and involves the same subject matter, is necessarily a part of the case which Mr. Gunther submitted to the court. In fact, Mr. Gunther represented, through his attorneys, to the court that he would make the "Interpretation" a part of the enforcement proceeding. As you know, the "Interpretation" was progressed and released without affording the Carrier proper notice or opportunity to be heard, as is required by the Railway Labor Act, and consequently it could not be regarded as valid in any event.

As I pointed out in my letter to you of May 13, 1959, in reply to yours of May 8, 1959, this matter was presented to the court and has been disposed of by final judgment. In view of these facts, there is no Award outstanding with which the Company has not complied.

Very truly yours,

(Signed) K. K. SCHOMP
(CAB)

[fol. 257] Declaration of service by mail (omitted in printing).

[fol. 258]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil No. 2459-SD-W

[Title omitted]

SUPPLEMENTAL AFFIDAVIT OF K. K. SCHOMP—
Filed July 23, 1962

State of California,
City and County of San Francisco, ss.

K. K. Schomp, being first duly sworn, deposes and says:

This supplements the affidavit made by me on July 6, 1962, and filed in this proceeding in opposition to Petitioner's Notice of Motion and Motion for Relief from Final Judgment in the above-entitled action.

As I stated in the aforementioned affidavit and in my prior affidavits of November 23 and 30, 1960, and May 11, 1961, there was no provision for a three-doctor panel in the collective bargaining agreement as of December 30, 1954, applicable to the facts of Mr. Gunther's case. The first such applicable provision for a three-doctor panel was agreed upon on December 1, 1959, which agreement is [fol. 259] attached as Exhibit "A" to my affidavit of July 6, 1962.

It is true that a three-doctor panel was created by agreement between the engineers represented by the Brotherhood of Locomotive Engineers (BLE) and the Southern Pacific Company (SP) in the November 13, 1947, letter agreement (Exhibit "L" to Mr. Colyar's affidavit, hereinafter referred to as the "Burbank letter," which is the same as his Exhibit "K" for the purposes hereof). But this is very different from any claim that an agreement between SP and its engineers represented by BLE (SP engineers'

[File endorsement omitted]

agreement) is the same as an agreement between San Diego and Arizona Eastern Railway Company (SD&AE) and its employees represented by BLE (SD&AE engineers' agreement). A copy of the SP-BLE agreement is attached as Exhibit "A" hereto. The SP engineers' agreement applies only to employees of SP while the SD&AE engineers' agreement applies only to employees of SD&AE, and neither applies as such to employees of the other company. Thus, the rates of pay, rules and working conditions relating to engineers of each company are prescribed by its own said agreement. For example, engineers on SD&AE have seniority solely on their own SD&AE seniority roster and no seniority rights on SP by reason of their length of service on SD&AE. Since he entered the service of SD&AE Mr. Gunther's name never at any time appeared on any SP engineers' roster and he never during said period had any right to exercise seniority on SP. In a like manner SP engineers have seniority solely on their own SP seniority roster and no seniority rights on SD&AE by reason of their length of service on SP.

SD&AE is a wholly owned subsidiary of SP and its directors and non-operating officers and its Vice President and General Manager at Los Angeles, California, also hold official positions on SP. For example, I am Manager of Personnel of each company. The two companies are separate operations and the employees subject to any collective [fol. 260] bargaining agreement of one company do not hold seniority or obtain any rights on the other company by reason of their said agreement. This is apparent from a reading of the SP and SD&AE engineers' agreements which are exhibits in this case.

For many years prior to May 30, 1945, the craft or class of Locomotive Engineers on the SD&AE was represented by the BLE, a railway labor organization, national in scope, which as of April 5, 1960, represented its members under 283 collective bargaining agreements on most American railroads. Whenever there is a dispute as to the representative to be selected, the representative organization is selected in the manner set forth in Section 2 Ninth of the

Railway Labor Act and is certified by the National Mediation Board. On May 30, 1945, as will be noted by referring to Sheet 1, Exhibit "B", attached to this affidavit, Mr. H. R. Gernreich, Vice President and General Manager, SD&AE, Mr. A. Johnston, Grand Chief Engineer, BLE,, and Mr. D. B. Robertson, President, Brotherhood of Locomotive Firemen and Enginemen (BLF&E), were advised jointly by Mr. Robert F. Cole, Secretary, National Mediation Board, that the said Board was in receipt of an application from the BLF&E to investigate a representation dispute among the locomotive engineers of the SD&AE. Following an election conducted by the National Mediation Board, that Board under date of February 6, 1946, (Sheet 2, Exhibit "B") issued its Certification in Case No. R-1488 certifying that at the time application was received, locomotive engineers were represented by the BLE and that on the basis of the investigation and report of election no change in representation was desired by these employes.

Under date of May 5, 1950, another application was submitted to the National Mediation Board by the BLF&E for investigation of a representation dispute under the provisions of Section 2 Ninth of the Railway Labor Act with respect to the locomotive engineers of the SD&AE. Exhibit "C", Sheets 1 and 2, attached hereto, documents the [fol. 261] application, and Certification by the National Mediation Board which indicates that no change was made in the representation by the BLE of the craft or class of Locomotive Engineers.

Certification of a representative of a particular craft or class of employees on the SD&AE pursuant to Section 2 Ninth of the Railway Labor Act has no effect on the representation of the same craft or class of employes on any other railroad, including the SP. Thus, at the time the elections above referred to were held, no question was raised concerning representation of engineers of SP or that the two groups should be voted as one. Under date of July 31, 1958, the BLE was certified by the National Mediation Board in Case No. R-3284 as the duly authorized representative of the craft or class of Locomotive Firemen,

Hostlers and Hostler Helpers of the SD&AE. At that time, the craft or class of Locomotive Firemen, Hostlers, and Hostler Helpers of SP was represented for collective bargaining purposes under the Railway Labor Act and in accordance with Section 2 Ninth of the said Act by the BLF&E. That craft had been represented for many years prior to that time by the said BLF&E and is presently represented by that organization.

At the present time the craft or class of Locomotive Firemen, Hostlers and Hostler Helpers, employees of the SD&AE, continues to be represented by the BLE under National Mediation Board certification in Case No. R-3284 above referred to.

It is not uncommon that there may be more than one agreement in effect on a particular railroad covering the same craft but involving different groups in the craft. On SP (Pacific Lines) there are three agreements with BLE; namely, one covering the craft of Locomotive Engineers on the SP (Pacific Lines); one covering engineers on the portion of the lines now referred to as the former El Paso and Southwestern Railway System; and one covering engineers employed in Nogales, Arizona, Yard. These agreements are administered individually and separately.

[fol. 262] The agreement covering engineers on the SD &AE is administered without regard to any other agreement covering the craft of locomotive engineers. This is evidenced by the fact that when changes in the rates of pay, rules or working conditions of said agreement are desired, a notice pursuant to Section 6 of the Railway Labor Act, referring solely to that agreement and the appropriate Article of the agreement itself, is required. For example, in case of request on the part of the BLE for increase in wages, notices are served separately as to each agreement that may be involved. Absent such notice for any one of the agreements involved, the only agreements which will be changed by settlement of the Section 6 notices, will be those for which the notices were served.

Attached as Exhibits "D", "E", "F" and "G" are copies of notices dated March 2, 1959, served by the BLE for changes in agreements, effective November 1, 1959. It will be noted that separate notices were served on behalf of the SD&AE (Exhibit "D"); SP (Pacific System) Exhibit "E"; former El Paso and Southwestern (Exhibit "F"); and Nogales, Arizona Yard (Exhibit "G").

The agreement ultimately reached in settlement of the demands covered by the Section 6 notices (Exhibits "D", "E", "F" and "G") is dated June 6, 1960, and is between participating carriers represented by the Eastern, Western and Southeastern Carriers' Conference Committees and the locomotive engineers (motormen) of such carriers represented by the BLE through their conference committee.

Said agreement contains the following:

"Article VIII—Effect of This Agreement

"This Agreement is made for the purpose of implementing the Award of Arbitration Board No. 254 dated June 3, 1960, disposing of the dispute growing out of notices served on the carriers listed in Exhibits A, B and C on or about March 2, 1959 and the notices served by said carriers on the employees represented by the Brotherhood of Locomotive Engineers on or about March 20, 1959 pursuant to the provisions of said Award of June 3, 1960, *and shall be construed as a separate Agreement by and on behalf of each of said carriers and its employes represented by the organization signatory hereto.*

[fol. 263] "SIGNED AT CHICAGO, ILLINOIS, THIS SIXTH DAY OF JUNE, 1960." (Emphasis added)

SP (Pacific Lines) and the SD&AE are listed as individual carriers, parties to said agreement.

The collective agreements themselves by their very identification on the covers and in the preambles identify the specific engineers to whom they relate.

The preamble of the SD&AE agreement reads as follows:

"Agreement

"Between San Diego & Arizona Eastern Railway Company and General Committee of Adjustment of Brotherhood of Locomotive Engineers of the San Diego & Arizona Eastern Railway Company.

"It is hereby understood and agreed between the Management of the San Diego & Arizona Eastern Railway Company and its Locomotive Engineers represented by the General Committee of Adjustment of Brotherhood of Locomotive Engineers, that the following rules and regulations covering rates of pay and working conditions of engineers on the San Diego & Arizona Eastern Railway Company, shall be in effect on and after January 1, 1956.

"Revised Rates of Pay effective October 1, 1955."

The preamble of the SP engineers' agreement reads as follows:

"Agreement

"It is hereby agreed by and between the Southern Pacific Company (Pacific Lines), excluding the former El Paso and Southwestern System, and its locomotive engineers represented by the General Committee of Adjustment of the Brotherhood of Locomotive Engineers, that the following rules and regulations shall govern the rates of pay and working conditions of locomotive engineers on the Southern Pacific (Pacific Lines), excluding the former El Paso and Southwestern System, effective as of August 1, 1958."

That the separate agreements covering engineers of the SD&AE and the SP (Pacific Lines) are administered, revised or amended individually is further confirmed by Exhibit "H" attached hereto and made a part of this affidavit. For example, by referring to Exhibit "H" it will be noted that with respect to Article 6, Section 3, it was de-

sired by the BLE to incorporate into SD&AE engineers' [fol. 264] agreement Southern Pacific settlements (agreement provisions) covered by files E-11832; E&F 1-45-550; and E-01104; E&F 2-76. With respect to Article 9, Section 1 b, organization desired to incorporate SP Section 1 b. of Article 12 into SD&AE engineers' agreement.

Failure of the parties to agree on the incorporation into the SD&AE engineers' agreement of any of the requests in Exhibit "H" would have resulted in that provision not becoming a part of the SD&AE engineers' agreement.

The collective agreement covering engineers on SD&AE is administered and interpreted individually and separately from the collective agreement covering engineers of the SP (Pacific Lines). This is established by the fact that two separate Special Adjustment Boards authorized by the National Mediation Board have been established, one on the SP to handle and dispose of grievances arising out of the interpretation or application of the rules contained in the SP engineers' agreement (with no jurisdiction on SD&AE agreement matters), and one on SD&AE to perform the same function as to the SD&AE engineers' agreement (with no jurisdiction on SP agreement matters).

Additional evidence of recognition that settlements made in connection with one agreement do not automatically apply to other agreements is provided by Exhibit "I" attached hereto, reproducing copy of General Chairman J. P. Colyar's letter addressed to me in my capacity as Manager of Personnel, SD&AE, requesting the adoption on SD&AE of the settlement therein referred to. It is well to note that the settlement referred to is dated August 21, 1934, and it was not until September 22, 1961, that the adoption of such settlement was requested for the SD&AE. Thus, it is clear that settlements relating to a particular agreement do not apply to another agreement unless specific and separate action is taken to so apply them.

[fol. 265] SP is incorporated in Delaware. SD&AE is incorporated in Nevada. Each reports separately to the Interstate Commerce Commission on numerous subjects, including numbers and classes of employees, payrolls, in-

come, tonnage hauled, hours of service of employees, etc. Each company is a common carrier engaged in transportation for hire, as that term is defined in Section 1(3)(a) of the Interstate Commerce Act (49 U.S.C. Sec. 1(3)(a)).

SP (Pacific Lines) operates some 12,046.19 miles of trackage in the states of California, Texas, Arizona, New Mexico, Nevada, Utah and Oregon. SD&AE operates only in California between El Centro and San Diego in conjunction with the Tijuana and Tecate Railway Company, which operates through a portion of Mexico. Exhibit "J" hereto is a map of the SD&AE and Tijuana and Tecate lines of railroad.

K. K. Schomp

Subscribed and sworn to before me this 20th day of July, 1962.

Norman T. Stone, Notary Public in and for the City and County of San Francisco, State of California.

[fol. 266] CLERK'S NOTE

Exhibit A to Supplemental affidavit of K. K. Schomp "Agreement by and between Southern Pacific Company (Pacific Lines) (Excluding the former El Paso and Southwestern System) and its Locomotive Engineers Represented by the General Committee of Adjustment of the Brotherhood of Locomotive Engineers effective August 1, 1958" (omitted in printing).

[fol. 267]

EXHIBIT B TO SUPPLEMENT AFFIDAVIT OF K. K. SCHOMP

Sheet 1

NATIONAL MEDIATION BOARD

WASHINGTON (25)

[Handwritten notation—E-3006-5-6—BLE]

May 30, 1945

Mr. H. R. Gernreich
Vice President & General Manager
San Diego & Arizona Eastern Railway Company
45 Twelfth Avenue
San Diego, California

Mr. A. Johnston, Grand Chief Engineer
Brotherhood Locomotive Engineers
Cleveland, Ohio

Mr. D. B. Robertson, President
Brotherhood of Locomotive Firemen & Enginemen
318 Keith Building
Cleveland, Ohio

Gentlemen:

This Board is in receipt of an application from the Brotherhood of Locomotive Firemen & Enginemen for the investigation of a representation dispute among the following described employees of the San Diego and Arizona Eastern Railway:

Engineers

It will be appreciated if Mr. Gernreich will advise the Board the number of employees in this group now in the service of the company.

The Board's records show that these employees are now represented by the Brotherhood Locomotive Engineers, and

any statement which Mr. Johnston wishes to make in connection with the application will be appreciated.

Very truly yours,

/s/ Robert F. Cole
Robert F. Cole
Secretary

[Stamp—San Diego & Arizona Eastern Railway Co.—Jun 5 1945—Operating Department]

PLEASE MAKE SUBMISSION AND REPLY TO CORRESPONDENCE IN DUPLICATE

[fol. 268]

Sheet 2

COPY

NATIONAL MEDIATION BOARD

Washington

[Stamp—E. A.—Feb 27 1946]

Case No. R-1488

Certification

February 6, 1946

In the matter of

Representation of Employees

of the

San Diego and Arizona Eastern Railway Company
Locomotive Engineers

The services of the National Mediation Board were invoked by the Brotherhood of Locomotive Firemen and Enginemen to investigate and determine who may represent locomotive engineers, employed by the San Diego and Arizona Eastern Railway Company, for the purposes of

the Railway Labor Act, as provided by Section 2, Ninth, thereof.

At the time application was received these employees were represented by the Brotherhood of Locomotive Engineers.

The Board assigned Mr. H. Albert Smith, Mediator, to conduct investigation and, after finding that a dispute existed among the employees concerned, directed him to take a secret ballot to determine their choice, using an eligible list agreed to by representatives of the contesting organizations.

Following is the result of the election as reported by the mediator, and attested to on February 1, 1946, by representatives of the contesting organizations who acted as observers:

Number of employees voting:

	For Brotherhood of Locomotive Engineers	For Brotherhood of Locomotive Firemen	Number of employees eligible
Locomotive Engineers	12	10	22

On the basis of the investigation and report of election, the National Mediation Board hereby certifies that no change in representation is desired by these employees.

By order of the NATIONAL MEDIATION BOARD.

Robert F. Cole
Secretary